89-1530

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1989

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD),

Petitioner,

vs.

ARMY CORPS OF ENGINEERS, NATIONAL PARK SERVICE, INTERSTATE COMMERCE COMMISSION, CONAGRA, INC., OMAHA DEVELOPMENT FOUNDATION, CITY OF OMAHA, COUNTY OF DOUGLAS,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal agencies must implement the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) where they have approval power over three critical aspects of a non federal development project, without which approvals, or any of them, the project is not at all possible.

2. Whether under NEPA and NHPA a federal agency is to consider the indirect and off site impacts of its actions on historic properties.

PARTIES BELOW

The Petitioner is a Nebraska non profit corporation, People For Responsible Omaha Urban Development (PROUD). The Respondents are the Army Corps of Engineers, the National Park Service, the Interstate Commerce Commission, ConAgra, Omaha Development Foundation (ODF), the City of Omaha, and the County of Douglas. The National Trust for Historic Preservation intervened below in support of PROUD. Mercer Management Company and Roger Durand were plaintiffs with PROUD.

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OPINIONS BELOW

No opinion below has been authorized for publication including the opinion of the Circuit Court of Appeals. Magistrate Kopf, District of Nebraska, sitting as a Master, held a bifurcated trial and issued Findings and Recommendations on July 28, 1988 (App., pp. 1-73), covering issues the Petitioner relies on here and January 20, 1989, covering issues the Petitioner does not appeal from. District Judge Warren Urbom ruled upon the first Findings and Recommendations December 12, 1988 (App., pp. 74-105) and entered judgment February 14, 1989 (App., pp. 106-107). Petitioner's appeal was denied by the Court of Appeals for the Eighth Circuit on September 14, 1989, by an opinion not to be published and appearing in the Appendix at pp. 112 to 115. With the exception of a temporary stay granted by the Circuit on March 1, 1989, to June 9, 1989, (App. 108-111), no decision has favored the Petitioner except that its standing was confirmed.

JURISDICTION

The decision of the United States Court of Appeals for the Eighth Circuit was entered September 14, 1989. A Petition for Rehearing and Hearing En Banc was denied October 20, 1989 (App., p. 118). Justice Blackmun by order of January 12, 1990, granted PROUD's and the National Trust's Application to extend the time for filing this petition. That order extended the time for filing this petition to February 16, 1990. A petition on photocopy process was timely presented to the Clerk of Court, and on advice of the Clerk's office this petition, conforming to

Rule 33, is timely filed. Jurisdiction of this Court is invoked under 28 USC 1254(1).

STATUTES AND REGULATIONS INVOLVED

National Historic Preservation Act 16 USC 470(f):

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act [16 USCS §§ 470i et seq.] a reasonable opportunity to comment with regard to such undertaking.

Advisory Council on Historic Preservation 36 CFR 800.2(o)

> (o) "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section. 106.

36 CFR 800.2(c)

(c) "Area of potential effects" means the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist.

National Environmental Policy 42 USC 4332(2)(C)

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall – . . .

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> > (i) the environmental impact of the proposed action,
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> > (iii) alternatives to the proposed action,
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . .

Council on Environmental Quality 40 CFR 1508.8

§ 1508.8 Effects

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under

the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). . . .

(b) Federal actions tend to fall within one of the following categories:

. . .

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

STATEMENT OF THE CASE

1. Jurisdictional basis of initial proceedings.

PROUD filed its case in the United States District Court for the District of Nebraska in March, 1988, asserting violations of federal law, especially the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). The statutory basis for district court jurisdiction included 28 USC 1331 (federal question), 28 USC 1361 (provides for compelling a federal officer to act), and 28 USC 2201 & 2202 (provides for declaratory judgments and relief required thereby).

2. Historic facts on Federal presence in the affected area.

This case involves the largest single destruction of historic property since the enactment of the National Historic Preservation Act.

The 113 acre area tract that is the subject of this suit sits on the west bank of the Missouri River and forms a part of eastern downtown Omaha. In the 1940's, just up from the river bank, the Corps of Engineers built a floodwall for Omaha with related pump and sewer works that protect a large portion of the 113 acres, together with other parts of lower downtown, from flooding.

Historically, the eastern two-thirds of the area was laced by rail tracks, some that services local business and warehouses, but most were spur lines which had been inactive for years. When the subject development plan was hatched, the Union Pacific Railroad was running a train a day to and from Council Bluffs, Iowa, to and from

North Omaha businesses, averaging forty cars a day each way through the 113 acre area over a Union Pacific track called Side Hill Lead. It pierced the 113 acre tract on a generally east-west basis, joined up with a rail along the floodwall at a point in the 113 acre area where Union Pacific owned the floodwall rail. South of that point Burlington Northern owned the floodwall rail.

The idea of a public park in the tract had been around from the early 1970's. Douglas County had solicited* and received $750,000.00 from the National Park Service between 1978 to 1986, which money was used by the County to acquire some of the land in the tract that would be used for a park and some of the funds went to a set of park plans drawn up in 1983. Other state and county funds went into the acquisition of land and planning.

Anchoring the west end of this 113 acre parcel was the six block Jobbers Canyon warehouse district that housed many businesses. One warehouse in 1985 had been converted to luxury apartments. In December, 1986, upon nomination by the City of Omaha, Jobbers Canyon was entered upon the National Register of Historic Sites as Jobbers Canyon Historic District.

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*Part of the solicitation extolled Jobbers Canyon as a complement to the park. The idea was that renovation of some of the warehouses into residences would provide some park users.

3. Jobbers Canyon threatened by Riverfront Redevelopment Plan.

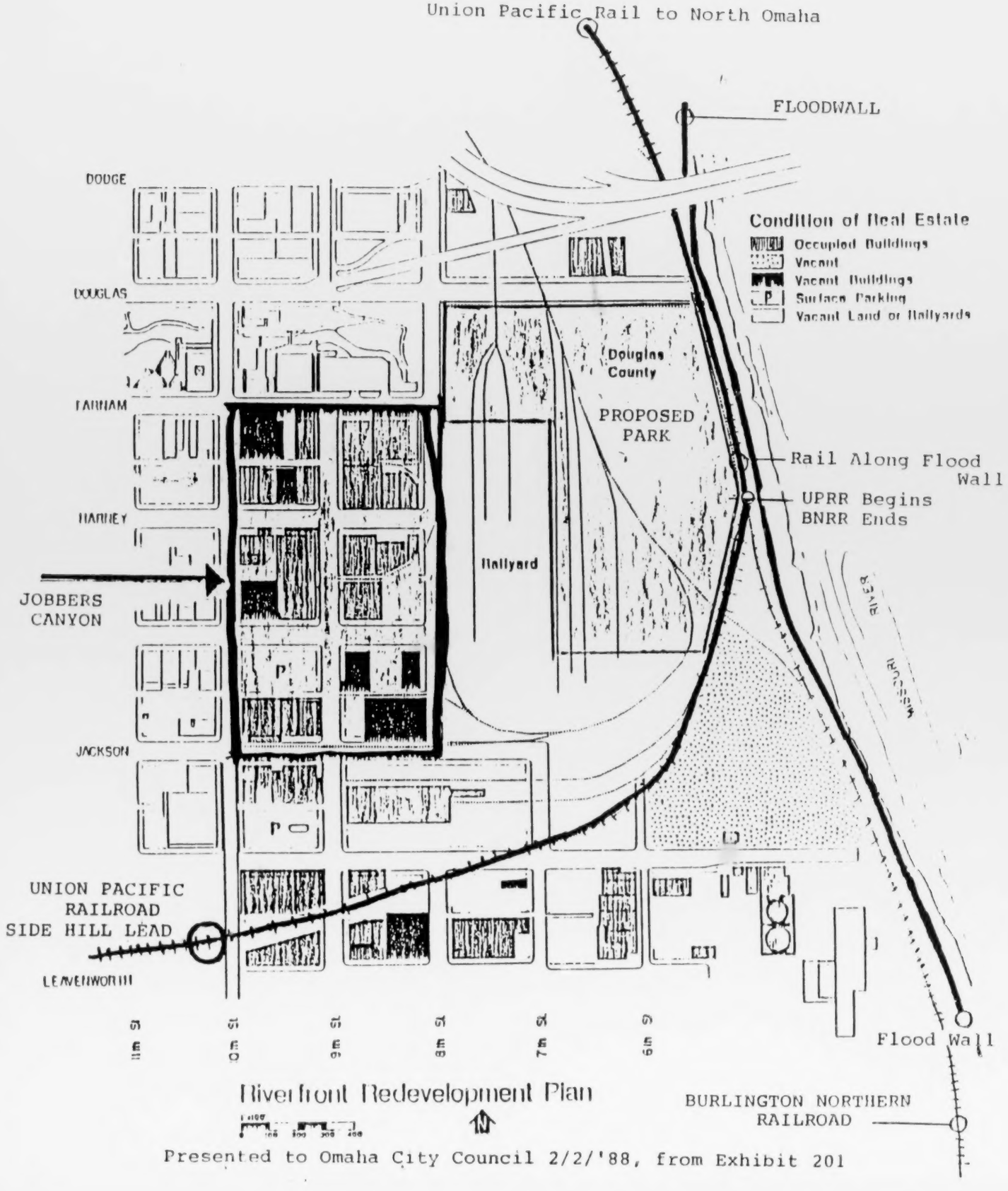
In mid 1987, the City, ODF, ConAgra, and Douglas County commenced discussions aimed at developing the 113 acre tract. Against initial protests quickly abandoned by the City, ConAgra insisted that if it were part of any deal, *Jobbers Canyon would have to be demolished* to both make room for ConAgra's desire to have a campus-like headquarters and to satisfy its sense of green lawn aesthetics. Barely six months after getting Jobbers Canyon on the National Register, the City was developing a plan for the 113 acres that would require the total demolition of Jobbers Canyon.

The City Planning Department published its Riverfront Redevelopment Plan on January 12, 1988. The City Council approved the plan February 2, 1988. ConAgra, the City, County, and ODF came quickly to substantial agreement implementing the plan by March 15, 1988. The County would develop the park including removal of sewers within the park boundaries. The City would provide streets, remove and reroute sewers and provide sewer needs for ConAgra, and would persuade the Burlington and UPRR to reroute rail traffic so that all rail traffic could move along the floodwall line out of sight behind a berm. The City would prepare, grade, and present ready for building the 65 acres or so devoted to ConAgra. ODF, having options on most of Jobbers Canyon even before the Plan was published, would raise money to buy and demolish Jobbers Canyon. ConAgra would build its campus. ODF would finance the park.

4. Approval roles of Corps of Engineers, National Park Service and Interstate Commerce Commission.

The proposed transformation of the 113 acres is graphically and accurately enough for these purposes shown on the before and after renderings on the next two pages.

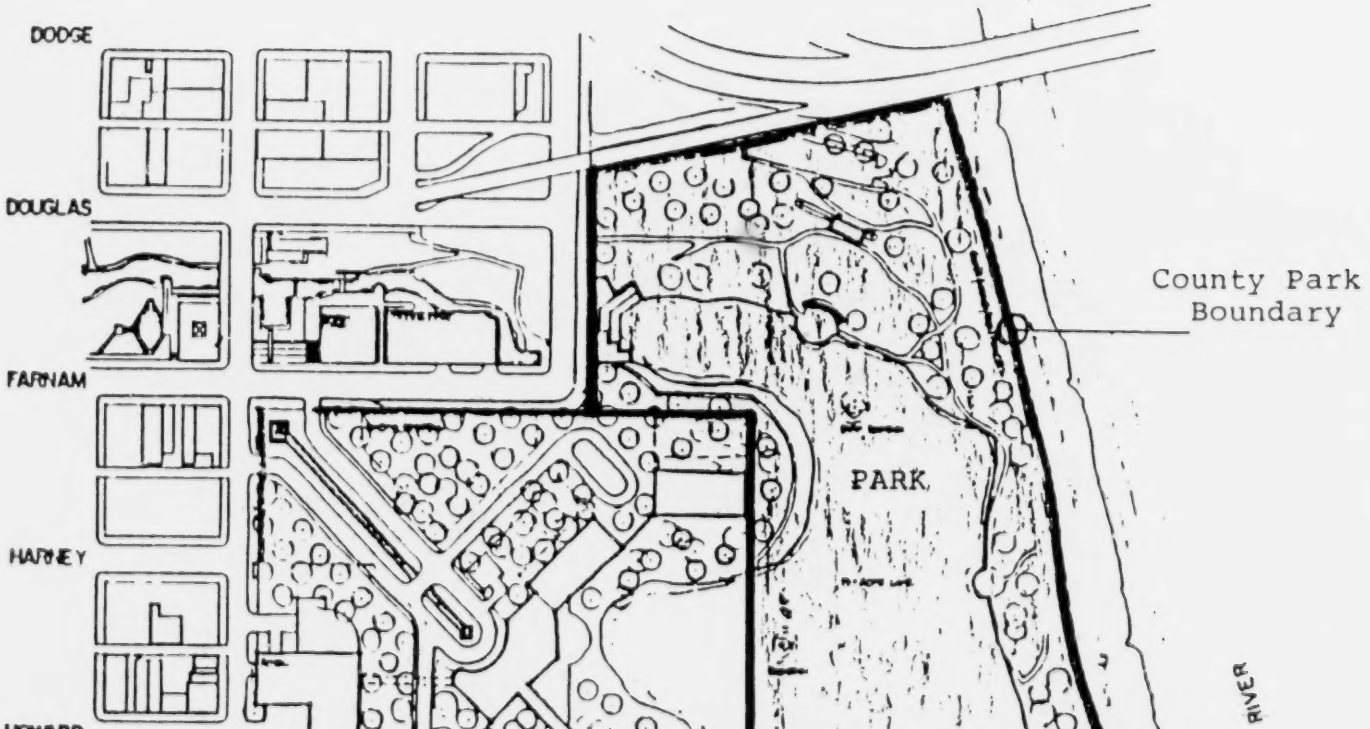
BEFORE



Riverfront Redevelopment Plan

Presented to Omaha City Council 2/2/'88, from Exhibit 201

AFTER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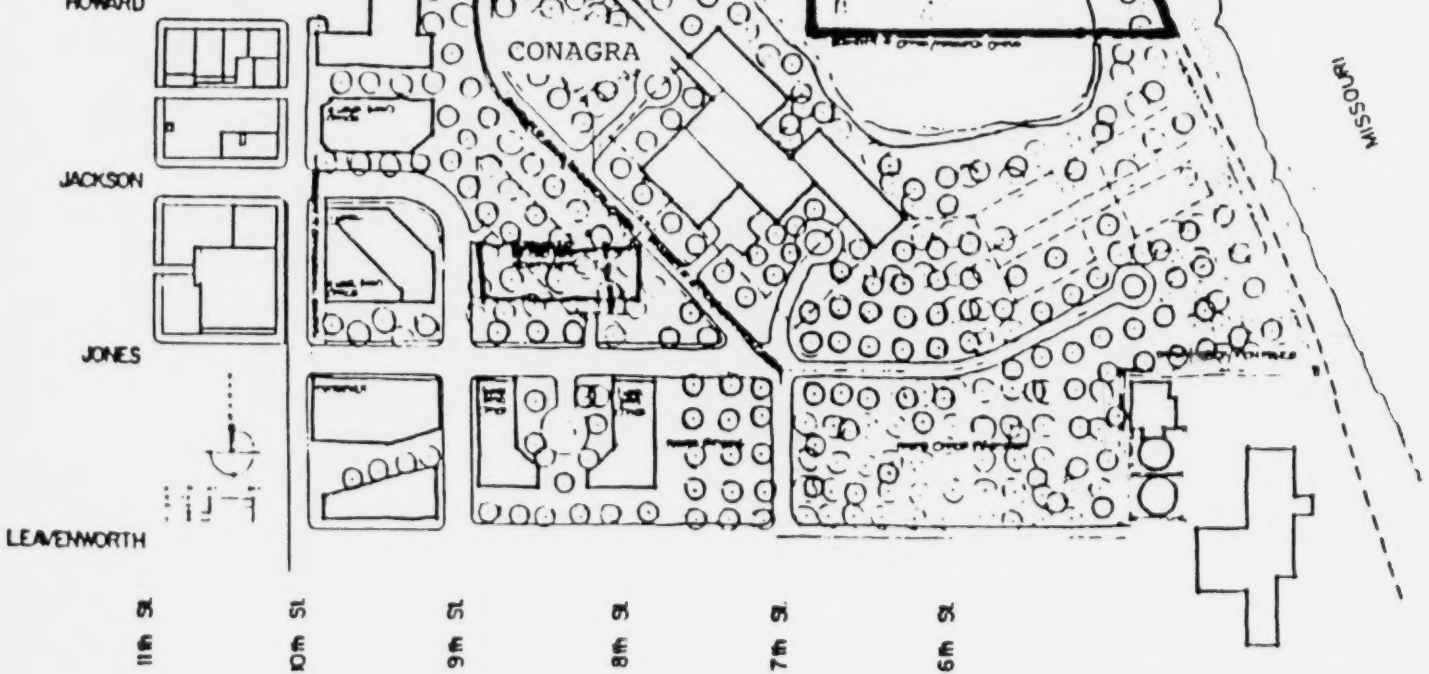
County Park
Boundary
PARK
RIVER



Site Plan

Figure 6

from RIVERFRONT REDEVELOPMENT PLAN presented to
OMAHA CITY COUNCIL on 2/2/'88, Exhibit 201

The agreement reached by ConAgra, City of Omaha, Douglas County, and ODF (Exhibit 202) bound the parties to bring off this integrated transformation. From a study of these renderings, the following relationships affecting Federal concerns appear and are indisputable for the purposes of this case:

(a) Three blocks of Jobbers Canyon Historic District were to be demolished for a road to service ConAgra, a fourth block for campus space.

(b) Side Hill Lead travels one block south of Jobbers Canyon, and would take UPRR's train a day to and from Council Bluffs right through ConAgra's private campus and over the lake if provisions could not be made to run the train along the floodwall line and let UPRR abandon Side Hill Lead and lease Burlington Northern tracks to get to and use the Burlington Northern floodwall line. The abandonment and shared line agreement are subject to ICC approval.

(c) The new Riverfront park concept had a host of deviations from the park as portrayed in soliciting National Park Service funding in 1978 and as planned and partially paid for by NPS funds in 1983. The more important changes were that Jobbers Canyon will be destroyed not complemented by the park, and the former idea of ready access from several directions (6th, 7th, 8th, Howard and Harney Streets), and the ability of park users to traverse the entire lake shore is cut off by ConAgra's making most of the west and south shore its own private property and cutting off access from 6th, 7th, 8th, Howard and Harney Street. These changes and other problems gave the National Park

Service approval power over the new proposed Riverfront Park. If the National Park Service denied these changes allowing ConAgra its privacy at the expense of public access, the project would not go forward short of ConAgra relenting on those matters.

(d) The floodwall built by and overseen by the Corps of Engineers protects from flood most of the 113 acre tract. It operates in conjunction with a sewer and pump system that cannot be changed without approval by the District Engineer. Pressurized sewers under Farnam Street would have to be removed and pressurized sewers under Jones Street would be modified. A number of sewers would be removed under the lake. Without Corps approval, the park could not be built nor could the sewer requirements of ConAgra's campus be met. Without these approvals, the project would literally have to put up with a smelly park, smelly office buildings, and no flood protection.

The federal agencies in this case had the foregoing significant federal interest (flood control, park usage, and rail traffic) to watch out for and had approval powers that went to critical aspects of the project: ConAgra's need for privacy, the developers' need for getting rail traffic out of sight and off to the east side, and the removal of existing sewers and restoration of their function by new sewers so the park and offices would not smell and would still have flood protection. This suit was made necessary because the National Park Service, the

Corps of Engineers, and Interstate Commerce Commission did not and have not exercised their approval authority and in so doing follow NHPA and NEPA.

5. Implementation of the Agreement and Federal Inaction.

In July, 1988, Union Pacific Railroad abandoned Side Hill Lead and entered a joint use agreement with Burlington Northern so that their train a day each way skirts along the floodwall, to be hidden from public view by a berm. The Interstate Commerce Commission approved nothing and insisted in this lawsuit that it had nothing to approve. The Farnam Street pressure sewer has been removed and other sewers removed and/or modified. The District Engineer approved nothing and insisted in this lawsuit that he had nothing to approve. The 1983 plan for the park as a high access people park complementing Jobbers Canyon is changed. Jobbers Canyon is gone. The National Park Service has approved nothing and insists in this lawsuit it had nothing to approve.

The National Park Service and the Department of the Interior have jurisdiction over the Riverfront Redevelopment Plan and Agreement because Douglas County acquired and planned the park now being developed under the Redevelopment Agreement in part with a federal grant of $750,000.00 received from the Land and Water Conservation Fund in 1978. See *Friends of the Shawangunks, Inc. v. Clark, Inc.*, 754 F.2d 446 (2d Cir. 1985). The Army Corps of Engineers has jurisdiction over the Riverfront Redevelopment Plan because the project requires a number of significant modifications to features of the

flood protection system, including the relocation, rerouting, and removal of sewer lines, requiring the Corps' approval under 33 CFR § 208.10(5). See *U.S. v. City of Irving*, 482 F.Supp. 393, 395 (N.D. Tex. 1979). The Interstate Commerce Commission has jurisdiction over the project because of the abandonment of a railroad line known as the "Side Hill Lead" and a joint use agreement between Burlington Northern Railroad and the Union Pacific Railroad rerouting rail traffic to a rail corridor along the Missouri River floodwall. 49 USC §§ 10903(a) and 11343(a)(6).

REASONS FOR GRANTING THE WRIT

The petitioner asserts there are three compelling reasons for granting this writ:

(1) The decision of the Eighth Circuit to the effect that there was not sufficient federal involvement in the Riverfront Redevelopment Plan by the Corps of Engineers, the National Park Service, and the Interstate Commerce Commission to trigger NHPA and NEPA compliance puts it in conflict with decisions of other Courts of Appeal.

(2) This Court has not but should answer, address, analyze and set the standards on the important issue of when a federal regulator ought implement NEPA and NHPA when its routine approval actions are to be exercised over essentially non federal projects.

(3) This decision of the Eighth Circuit confining federal regulator's consideration of impacts only to those

on the very site of the regulator's concern conflict with other Circuits and this Court's precedent requiring indirect and off site impacts be considered by federal regulators.

What is enough federal involvement to trigger NEPA and NHPA?

NEPA procedures, ranging from findings of no impact to the elaborate environmental impact statement are triggered by "major federal action." [42 USC 4332(2)(C)]. The NHPA protective device, the 106 evaluation and comment process (36 CFR 800, et seq.), are triggered by agency "undertakings." (16 USC 470(f))

With this decision the Eighth Circuit retreats from the tests developed by the Circuits on when the federal regulator reviewing a non federal project has the right and duty to implement NEPA and NHPA processes.

This decision has placed the Eighth Circuit at odds with the principle that generally but not absolutely non federal projects are considered federal actions for NEPA and NHPA purposes if they cannot "begin or continue without prior approval of a federal agency." *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988); *Maryland Conservation Council, Inc., v. Gilchrist*, 808 F.2d 1039, 1042 (4th Cir. 1986); *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 155 (DC Cir. 1985); *Binderman v. Morton*, 497 F.2d 1141, 1147 (2nd Cir. 1974); *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 277, 280 (3rd Cir. 1983); and *WATCH v. Harris*, 603 F.2d 310, 319-26 (2d Cir. 1979).

The Circuits and the federal agencies need this Court's articulation of standards and tests to apply in determining when the federal agency should comply with NEPA and NHPA in exercising federal approval power over essentially non-federal projects. This case is perfect for such an evaluation by this Court.

The "yes or no", "go or no go" test is not one the courts can apply absolutely for fear of a regulator with the most trivial federal interest stopping a worthy non federal project in the face of tenuous environmental or historic damage. Unfortunately, the corollary of that is the more frequent and tragic story of a timid regulator not exercising agency authority while a historic or environmental treasure is lost.

The Eighth Circuit refused to accept the position that Corps of Engineers jurisdiction of a single mile of a 70-mile private power line formed a basis for stopping the project. *Winnebago v. Ray*, 621 F.2d 269 (8th Cir.). Federal regulators probably should not be mere stumbling blocks. The problem of weighing intensity of federal interest in a non federal project frequently arises and explains the results of a number of cases where the courts found NEPA and NHPA not triggered. See, e.g., *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987); *Sylvester v. U.S. Army Corps of Engineers*, 882 F.2d 407, (9th Cir. 1989); *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976).

What ought trigger NEPA and NHPA? The agencies charged with protection of the environment and historic treasures are of the "go or no go", the "hair trigger" school. See Advisory Council on Historic Preservation, 36 CFR 800.2(c) & (o) and the Council on Environmental

Quality, 40 CFR 1508.8, 1508.18, & 1508.27. These agencies, like the *Hodel* Court expect a catlike vigilance of the regulator or bureaucrat.

The Eighth Circuit with this case and its earlier *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987) reject a hair trigger for NEPA and NHPA and opt for the unworkable, subjective, and unlawfully restrictive test "whether the overall federal involvement with the project is sufficient to turn an essentially private action into federal action." *Ringsred* at 828 F.2d 1305; this case, App., pp. 90-91. That test is no hair trigger. It is a double safety encouraging the regulator to keep his pistol in a locked drawer and avert his eyes while gray hordes of neo-Visigoths descend on historic, aesthetic, and environmental treasures, cannons cocked and aimed at unarmed local skirmishers ringing the treasure in Vain defense.

This case, with three federal agencies showing quantifiable degrees of legitimate agency business concern in the non federal project and having identifiable yes/no power over aspects critical to the project (need to reroute railroads, approve changes to the park to accommodate ConAgra's desire for privacy, and remove or change sewers to avoid smelly park and offices), is the perfect case to frame the standards for when the federal agency ought to apply NEPA and NHPA to non federal projects: a hair trigger, a double safety, or somewhere between.

The agency must consider indirect off-site impacts.

The Circuit sustained the erroneous analysis of Magistrate Kopf (Appendix 68-71) and concurred in by the District Court that because Jobbers Canyon was not in the

park, atop the Side Hill Lead, nor over pressure sewers (some non pressure tributaries entered Jobbers Canyon), no agency control existed in the matter of Jobbers Canyon. That conflicts with well settled principles of this Court recently repeated at *Robertson v. Methou Valley Citizens Council,* 109 S.Ct. 1835 (1988), and *Marsh v. Oregon Natural Resources Council,* 109 S.Ct. 1851 (1989).

The Circuit Court's opinion is fundamentally in conflict with the *Robertson* opinion. Like the Redevelopment Project at issue in this case, *Robertson* involved a *private* development, namely, a proposed ski resort, which required a permit from the U.S. Forest Service. The off-site impacts in *Robertson* involved the degradation of air quality and wildlife habitat by private land development that was expected to occur in the vicinity of the ski resort. This private development would affect air pollution by generating increased auto traffic and wood burning for stoves and fireplaces.

In deciding whether to grant the permit, the Supreme Court held that the federal agency in the *Robertson* case was required not only to consider the off-site impacts of the ski resort, but also to identify and describe mitigation measures for those impacts, even though the agency had little or no "control" over the implementation of these mitigation measures, since the proposed options were primarily measures that might be taken by state and local government agencies. *Id.* at 1841, 1843.

The Supreme Court left no doubt about the federal agency's mandatory obligation to identify and discuss these mitigation measures in detail, even though the agency did not have "jurisdiction" over the area in which

the impacts would occur and the agency could not guarantee that the mitigation measures would be adopted by the third parties. *Id.* at 1846.

> [W]here the adverse effects . . . are primarily attributable to predicted off-site development that will be subject to regulation by other governmental bodies, the EIS serves the function of offering those bodies adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner.

Id. See also *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 90 (1983). ("environmental impact . . . includes the effects of off-site activities").

The Circuit's opinion is so at odds on this issue with the orthodox position of this Court and all Circuits that this Court ought correct this glaring error by issuing the Writ.

The case is not moot.

Petitioner and its able ally below, National Trust For Historic Preservation, were faced with attempting to stop the largest single destruction of historic properties in the history of the National Register of Historic Sites. Three efforts at stays in the District Court failed. Demolition of the Canyon proceeded along with the case. The Circuit stayed the demolition of five of the remaining buildings from March 1, 1989, to June 9, 1989, then lifted the stay three months prior to rendering its September opinion. By the time of the September, 1989, opinion of the Court, *every remaining* Canyon building was gone or almost gone. Now nothing remains.

The *only* portion of the Eighth Circuit's opinion not in error was its determination the case was not moot. This Court should take the same position. Demolition of a historic or environmental treasure does not moot a case. NEPA and NHPA reviews frequently occur where costly historic or environmental damage is inevitable. In such cases, emphasis is directed toward mitigation. In this case, mitigation can include many concepts to include but not be limited to (1) professional gathering of historical and architectural data and photographs to historicise and document in detail Jobbers Canyon, its architecture and history for posterity; (2) discuss and consider mitigation of effects on the nearby Old Market Historic District; (3) consider opening foot path access across ConAgra to the park from 6th, 7th, 8th, Harney and Howard Streets and create public foot paths around the west and south shore ConAgra took from the public for its privacy needs. Any NEPA or NHPA process conducted now can be as exhaustive and helpful as if conducted when Jobbers Canyon still stood, but its inevitable loss was reluctantly accepted by an agency reviewer.

CONCLUSION

Historic properties are lost in this country to the developers' wrecking ball while federal agencies with a duty to act sit passively. This Court needs for the sake of historic preservation in America to address the standards and guidelines for the federal agency to implement NHPA and NEPA when the agency is confronted by a non federal project over which the agency has a legitimate agency business concern. This case provides the perfect

vehicle for that examination. The petitioner asks this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit in this matter.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, ("PROUD"), et al.,	) CV 88-0-247
Plaintiffs,	)
NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES,	) MAGISTRATE'S) FINDINGS AND) RECOMMENDA-) TIONS
Intervenor,	)
vs.	) (Filed JUL 28 1988)
INTERSTATE COMMERCE COMMISSION, et al.,	)
Defendants.	)

This case is presented to me in my capacity as a magistrate as well as in my capacity as a court-appointed master (filing 108). Oral argument, a four-day trial on two issues, and numerous briefs have been considered. I conducted the pretrial and trial proceedings, and I make these findings and recommendations as a magistrate, except to the extent required by my appointment as a master. The following findings and recommendations are considered by me to constitute findings of fact or conclusions of law interchangeably.

I.

A.

People for Responsible Urban Development ("Proud"), Mercer Management Company ("Mecer"), and Roger Durand, collectively referred to as plaintiffs, filed

this case on March 25, 1988 (filings 1, 30). The plaintiffs wanted to stop the demolition of a part of downtown Omaha, Nebraska referred to as "Jobbers Canyon." Jobbers Canyon consists of about six and one-quarter square blocks and includes a number of large-scale, primarily early twentieth century warehouses, structures evidently having historic significance. Jobbers Canyon is listed on the National Register of Historic Places ("National Register"), 16 U.S.C. § 470a, by nomination of the City of Omaha, Nebraska on December 4, 1986. (Exhibits 284, 285, 286).

The plaintiffs sued various federal defendants, including the Interstate Commerce Commission ("ICC"), the National Park Service ("Park Service"), and the Army Corp of Engineers ("Corps"), collectively referred to as the federal defendants. The plaintiffs also sued the City of Omaha ("City"), the County of Douglas, Nebraska ("County"), the Omaha Development Foundations ("ODF"), and ConAgra, Inc., collectively referred to as the nonfederal defendants. On April 13, 1988, Judge Urbom denied the plaintiffs' request for a temporary restraining order and preliminary injunction (filing 25).

On April 28, 1988, the National Trust for Historic Preservation in the United States ("Trust") requested leave to intervene (filing 32), asserting a position similar to that of the plaintiffs (Intervenor's Complaint, filing 32, attachment). This request was granted on May 20, 1988 (filing 98). The Trust should not be confused with the Advisory Council on Historic Preservation ("Advisory Council"); the Trust is a corporation created by Congress, while the Advisory Council is an independent agency of the United States. *Compare* 16 U.S.C. § 468 *with* 16 U.S.C.

§ 470i. The Advisory Council did not attempt to become a party to this litigation.

B.

About the time that Judge Urbom denied the motion for temporary restraining order and preliminary injunction, demolition of Jobbers Canyon began. The land and buildings comprising Jobbers Canyon are under the control of or are owned by the ODF, (Exhibit 202; Vol. I, TR 91:8-92:9), a private nonprofit corporation (Vol. I, TR 84:9-18). The demolition of Jobbers Canyon is a part of the implementation of a significant effort by the nonfederal defendants to revitalize downtown Omaha by, among other things, constructing a corporate office "campus" to be used by ConAgra, and developing the presently undeveloped, but dedicated, county-owned park, known as "Central Park East." This proposed revitalization is generally described in the so-called "River Redevelopment Plan" ("Redevelopment Plan"), (Exhibit 201), and exhaustively detailed in the "Redevelopment Agreement," (Exhibit 202). The Redevelopment Agreement was signed by all nonfederal defendants and became effective about May 3, 1988. The Agreement is not signed by the federal defendants. (Exhibit 202).

From a plain reading of the Redevelopment Agreement, and from listening to all the testimony and reading all relevant exhibits, the redevelopment project *does not intentionally or explicitly*: (a) call for use of federal financial aid to implement the redevelopment, except to the

extent that the use of Central Park East could be characterized as using federal funds, which funds were expended prior to the redevelopment project; or, (b) call for the issuance of any federal licenses, permits, or approvals, except to the extent that federal licenses, permits or approvals, if subsequently required, are required as an unintended and incidental consequence of some part of the redevelopment. As stated by the nonfederal defendants in their brief, "the parties to the Riverfront Redevelopment Agreement have desired from the outset to design and implement a project totally local in character and absent federal assistance or involvement." Trial Brief of Non-Federal Defendants at 34.

Jobbers Canyon is generally bounded by 8th Street, 10th Street, Farnam Street, and Jackson Street (Exhibit 201, p.3 and fig. 5). One building in the Canyon is not being demolished, but rather is being developed (Exhibit 284 (map on last page); Vol I TR: 180:4-181:13). ODF requires no federal approvals to demolish the Canyon, and has not and will not seek any federal assistance regarding the Canyon. (Exhibit 106). Central Park East is located to the east of Jobbers Canyon, and, when developed, will generally be described as having boundaries extending east, from the present terminus of the Central Park Mall (a previously developed park/mall not to be confused with Central Park East) at Eighth Street to the Burlington Northern riverfront line, and from the north, bounded by the I-480 bridge, to the south, corresponding approximately with the extended south right-of-way line of Howard Street. (Exhibit 201, p. 12, figs. 5 and 6). Exhibit 1026 depicts the park concept. The ConAgra campus will not be located in Central Park East, but will

generally be located to the south and west of the park. (Exhibit 201, pp. 12-13, figs. 4, 5, and 6; Exhibit 202, attached exhibit 4). The park will remain a public park. (Exhibit 202). Additionally, Central Park East is not located on land where Jobbers Canyon sits.

Central Park East started in 1978 when the State of Nebraska, through the Game and Parks Commission, acting at the request of, and essentially for, the county, submitted an application, (Exhibit 217, pp. 1-6; Exhibit 221), to what is now known as the Park Service for federal funds to acquire and develop park property under the Land and Water Conservation Fund Act ("LWCFA"). 16 U.S.C. § 460*l*-1-8. Subsequently, the application was granted on June 16, 1978, and a contract was entered into by and between the State of Nebraska and the predecessor to the Park Service. (Exhibit 217, pp. 1-6).

Prior to the 1978 agreement being entered into, the predecessor of the Park Service issued a "negative declaration," indicating that the project – to acquire and develop Central Park East – would not significantly affect the quality of the environment within the meaning of National Environmental Policy Act ("NEPA"). (Exhibit 217, p. 35). After the negative declaration was issued, the State Historic Preservation Office advised by letter on May 30, 1978, that the project had been reviewed by that office and the project would have no effect upon properties enrolled in or eligible for inclusion on the National Register. (Exhibit 217, p. 26). Jobbers Canyon was considered in this 1978 review. (Vol. IV, TR: 800:1-4).

The original agreement was divided into two stages; stage 1 was for acquisition, and stage 2 was for development. (Exhibit 217, pp. 1-6). The application was amended six times, (Exhibits 217A, 217B, 217C, 217D, 217E and 217F), and the last amendment, dated February 6, 1986, deleted stage II. (Exhibit 217F). The county acquired the land, about 14.3 acres, with $750,000 from the LWCFA grant and other sources, and the project was "closed out" on February 19, 1986 by the Midwest Regional Office of the Park Service, indicating that the project was complete. (Exhibit 232).

The concept of Central Park East used in the instant redevelopment project includes the acquisition of additional land, without use of federal funds, and development of the park, including the creation of a lake, without federal funds. (Exhibit 202, section 4; Exhibit 1026). The Central Park East development contemplates a park where "passive" recreation will take place. (Exhibit 202, attached exhibit 4).

The area to be redeveloped includes old railroad trackage. Relocation of one Union Pacific industrial track, the "side hill lead," will be required. (Exhibit 201, pp. 7-8, 21, fig. 4; vol. II, TR 469:19-470:10; 472:1-473:16). This trackage is not located upon land where Jobbers Canyon sits.

On the easterly edge of the area to be redeveloped is the Missouri River, and adjacent to the river, on the Omaha side, is a levee system providing flood protection. (Vol IV, TR 940:25-941:3). The ground upon which the levee is situated is owned by the city, but the levee is supervised by the Corps (Vol. IV, TR 986:5-13;

940:25-941:3), pursuant to a quite detailed operations and maintenance manual, (Exhibit 293). The levee is not located upon land where Jobbers Canyon sits.

C.

(1)

Since the demolition of Jobbers Canyon threatened to make this litigation moot, the parties were placed on an expedited discovery schedule and trial on two limited issues was scheduled to commence on July 11, 1988. (filing 104). The two issues for trial were:

1. whether, based upon the existing Riverfront Redevelopment Agreement, including all approved plans, specifications and construction drawings as of the date of trial, there is any federal funding, federal licensing or other federal involvement requiring a section 106 hearing under the National Historic Preservation Act ("NHPA") or otherwise implicating the National Environmental Policy Act ("NEPA") or the Land and Water Conservation Fund Act ("LWCFA"); and

2. if the answer to the foregoing question is in the affirmative, whether a section 106, 16 U.S.C. § 470f, hearing (or other action required under the NHPA, the NEPA or the LWCFA) could result in a federally required retention of one or more buildings in Jobbers Canyon. (Filing 104).

These findings and recommendations do not attempt to resolve the merits of other issues.

(2)

There are three federal statutory schemes, together with related regulations, that must be considered: the NHPA, the NEPA, and the LWCFA.

(a)

Section 106 of the NHPA, 16 U.S.C. § 470f, attempts to afford the Advisory Council the opportunity to comment on federal undertakings which might impact upon historic properties:

> The head of any federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.

16 U.S.C. § 470f.

The term "undertaking" is defined by 36 C.F.R. § 800.2(o), which provides:

> "Undertaking" means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or

> programs and any of their elements not previously considered under section 106.

36 C.F.R. § 800.2(o) (1987).

(b)

Section 102(2)(C) of the NEPA, 42 U.S.C. § 4332(2)(C), requires that when any project involves a "major Federal [action] significantly affecting the quality of the human environment," an environmental impact statement must be prepared:

> [A]ll agencies of the Federal Government shall –
>
> . . . .
>
> (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.

42 U.S.C. § 4332.

(c)

Section 6(f)(3) of the LWCFA, 16 U.S.C. § 460*l*-8(f)(3), provides that "[n]o property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses." 16 U.S.C. § 460*l*-8(f)(3). The purpose of this provision is to insure that the land will be continually maintained in public recreation use, unless substitute property is provided. 36 CFR § 59.3(a) (1987).

(3)

Essentially, the plaintiffs and the intervenor claim that the project substantially involves three federal defendants: the ICC, the Corps, and the Park Service. (filing 248). The arguments of the plaintiffs and the intervenor are set forth below.

(a)

With regard to the ICC, the plaintiffs and the intervenor claim that the ICC must approve the "abandonment" of the "side hill lead," and the change in routing of traffic generally occasioned by the redevelopment (filing 248). Accordingly, it is argued that the ICC's decision to

approve or disapprove the change constitutes both a federal "undertaking" for NHPA purposes and "major Federal" action for NEPA purposes. Thus, since the ICC has not acted to approve or disapprove the change, it is claimed that all of the parties need be restrained until the ICC makes a decision, which decision will necessarily, so it is claimed, require a consultation with the Advisory Council pursuant to the NHPA and an environmental impact statement in accordance with the NEPA.

(b)

With regard to the Corps, the plaintiffs and intervenor claim that the redevelopment will require the excavation of a lake close to the Missouri river levee, the construction of a pedestrian overpass over the levee, and a change in the sewer system intersecting the levee (filing 248). Accordingly, it is argued that the Corps' decision approving or disapproving the proposed works constitutes both a federal "undertaking" for NHPA purposes and "major Federal" action for NEPA purposes. Thus, since the Corps has not acted to approve or disapprove the proposed works, it is claimed that all of the parties must be restrained until the Corps makes a decision, which decision will necessarily, so it is claimed, require consultation with the Advisory Council pursuant to the NHPA and an environmental impact statement in accordance with the NEPA.

(c)

The most extensive arguments are made with regard to the Park Service. (filing 248). These arguments are

intricate, and as best as I understand them, they are as follows.

First, under the LWCFA, assuming that the Central Park East project was properly closed as merely an acquisition project, and not also as a development project, the LWCFA grants manual requires a section 106 consultation with the Advisory Council before moving on to development of the park. The defendants should therefore be restrained until the consultation takes place and an environmental impact statement is issued.

Second, even if the pertinent portion of the LWCFA grants manual does not apply, the last amendment to the Central Park East agreement incorporated the original contract by reference. The original contract required that all development plans be submitted for approval to the Park Service prior to development. The defendants should, therefore, be restrained until such approval is given, which approval will necessarily require a section 106 consultation and the issuance of an environmental impact statement.

Third, the Park Service improperly closed out the LWCFA project regarding Central Park East in 1986 before the establishment of so-called "6(f)(3) boundaries" were set. (Section 6(f)(3) refers to section 6(f)(3) of the LWCFA.) Absent the setting of 6(f)(3) boundaries, the 1978 Central Park East Project is open, the Park Service must require the setting of 6(f)(3) boundaries, and not having done so, it must proceed to do so. When it proceeds to do so, the Park Service will be required to engage in a section 106 consultation and must issue an environmental impact statement. The defendants should

therefore be restrained until the section 106 consultation has occurred and the environmental impact statement issued.

Fourth, any future change in an LWCFA-assisted project which calls into question the original plans retroactively calls into question the basis of the original funding requiring the Secretary of the Interior to investigate whether the change contravenes the purpose of the original funding. Since the redevelopment involves the destruction of Jobbers Canyon rather than use as a residential neighborhood, since the park will be radically redesigned to serve as a front lawn for ConAgra, and since public access to the park will be limited, the Park Service must investigate because these changes contravene the original basis for the federal grant. If the Park Service must investigate, when it proceeds to do so, the Park Service will be required to engage in a section 106 consultation and must issue an environmental impact statement; accordingly, the defendants should be restrained until these acts occur.

Fifth, in two ways the county has relinquished control over Central Park East. On the one hand, the county has engaged in a complex financing scheme to develop the park whereby a private corporation will have control over the park, and thus no assurance can be given that the park might not be converted into a nonpublic use. On the other hand, the authority of the so-called architectural review committee provided for in the Redevelopment Agreement provides for the relinquishment of the county's control over the park. In essence, the park has been converted in violation of the purpose of the original grant, and pursuant to the LWCFA, the Park Service must

act to protect its interests under the LWCFA; when it acts, the action will of necessity require a section 106 consultation and an environmental impact statement. Therefore, it is argued, the defendants should be restrained until these acts occur.

II.

A.

The only parties to this litigation with no apparent personal or institutional bias or motive for any of their actions are the federal defendants. Clearly, the nonfederal defendants have an "economic bias" motivating them to redevelop downtown Omaha, and to intentionally avoid any federal involvement, presumably so they will not be confronted with some federal agency second-guessing their policy decision to demolish Jobbers Canyon. The plaintiffs and the intervenor have an "aesthetic bias" to preserve the Canyon, to disagree with the policy choice of the nonfederal defendants to demolish Jobbers Canyon, and to look for the slightest hint of federal involvement, hoping that a federal agency may be able to alter the policy choice of the nonfederal defendants. The federal defendants have no bias or motive that I can find which would detract from their objectivity in viewing the facts and applying the facts to the statutes and regulations particularly within their jurisdiction in an objective manner.

The federal defendants, by reference to the statutes and the regulations they administer, have taken the position that, among other things, there is no substantial federal involvement in the redevelopment generally, and

no federal involvement at all with the Canyon. Accordingly, because I find no bias or motive which causes me to believe that the federal defendants have acted other than objectively, it is appropriate here to give deference to an agency's interpretation of a statute which it administers, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), to follow the construction of the statute by those charged with its execution, unless there is compelling reason to believe that the construction is wrong, *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977), and to follow the construction by an agency of its own regulations unless that construction is unreasonable or inconsistent with the regulations. *Lyng v. Payne*, 476 U.S. 926, 939 (1986). I have therefore approached the facts with these principles in mind.

B.

At the core of this case is the question of how one determines whether the activities of essentially private developers implicates a federal interest sufficiently enough to trigger the provisions of the NHPA and the NEPA. I have especially considered six cases, all of which were brought to my attention by the parties. I shall summarize the holdings of these cases, and refer to them in relation to the facts of this case later in these findings and recommendations. The first three cases discussed are relied upon by the defendants, and last three cases are relied upon by the plaintiffs.

(1)

(a)

The first case relied upon by the defendants is *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987), in which Judge John R. Gibson authored the opinion. The facts of *Ringsred* are as follows. An Indian tribe and the City of Duluth created a development commission, the purpose of which was to develop a gaming facility in a former "Sears Building." The tribe bought the building and conveyed title in turn to the United States to hold the land in trust for the tribe. After the tribe fixed up the building, it caused the building to be leased to the commission. The leasing arrangement was approved by the United States, since it held the property in trust for the tribe. In exchange for the tribe's agreement to fix up the Sears building, which contract was approved by the government, the City agreed to build a parking ramp next door that would be leased to the commission. The parking ramp land was not situated on land owned by the tribe which was being held in trust by the government. *Id.* at 1306. For the United States, the Secretary of the Interior issued a negative environmental assessment (not an environmental impact statement), stating that the gaming facility would not have a significant environmental impact. The Secretary did not consider the impact of the parking ramp in the environmental assessment. *Id.* at 1307.

Ringsred brought suit. He wanted declaratory relief and an injunction prohibiting the construction of the parking ramp. Ringsred contended, among other things, that the United States had not properly considered the

NHPA and the NEPA. The court thus had to determine whether the proposed parking ramp was itself part of a major federal action, for, if it was, the parking ramp should have been considered by the Secretary. *See id.* Judge Gibson employed two tests.

First, Judge Gibson asked whether the parking ramp could be built without any federal legal action taking place. *Id.* at 1308. In other words, the Judge looked to determine whether, independent of the gaming facility, the City of Duluth could have built the ramp without federal permission or assistance. He found that "[n]o federal action is a *legal* condition precedent to the construction of the parking ramp." *Id.* (emphasis added) (citation omitted). *See Winnebago Tribe v. Ray*, 621 F.2d 269, 272-73 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980) (upholding the Corps' decision not to prepare an environmental impact statement for the entire electric transmission line project because the corps lacked sufficient control and responsibility over the entire project to properly evaluate the project). Or, stated otherwise, the city could have condemned the property for the building ramp without federal assistance or license. *Id.*

Second, Judge Gibson then looked to determine whether factually there was any connection between the parking ramp and the gaming facility. Here, the Judge found that the Secretary had a "factual veto," since, as a practical matter the government had to consent to the lease of, and rehabilitation contract for, the gaming facility before the City would build the ramp. It was concluded, however, that this "factual veto" was not sufficient to significantly involve the federal government. The court applied three tests to determine the significance or lack

thereof of the federal involvement: the degree of discretion exercised by the agency over the federal portion of the project, the gaming facility; whether the federal government had given any direct financial aid to the project; and, finally, whether the overall federal involvement with the project was sufficient to turn essentially private action into federal action. *Ringsred*, 828 F.2d at 1308 (quoting *Winnebago Tribe*, 621 F.2d at 272 (citation omitted)).

Finally, Judge Gibson concluded that the NEPA was not implicated because " '[a] private act does not become a federal act, albeit a "major" one, merely because of some incidental federal involvement.' " *Id.* (quoting *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 644 n.9 (5th Cir. 1983)). Insofar as the NHPA was concerned, the court concluded that since there was a lack of significant federal involvement for *NEPA* purposes, the project was not an "undertaking" for *NHPA* purposes. *Id.* at 1309.

(b)

The second case relied upon by the defendants is *Edwards v. First Bank of Dundee*, 534 F.2d 1242 (7th Cir. 1976). In *Edwards*, the district court enjoined a bank from demolishing its privately owned building, which building had, without its consent, been located in a historic district listed in the National Register. The bank wanted to build a new bank building on the underlying land, and would, as a matter of necessity, be required to obtain the permission of its federal regulator for authority to move into the new building. *Id.* at 1243.

On appeal, the Seventh Circuit Court of Appeals first recognized that the scope of the NHPA is no broader than

that of the NEPA. *Id.* at 1245 n.2. The court then stated that the basic jurisdictional question was not whether NEPA or NHPA might under some circumstances apply to the structure, but rather "whether the substantive provisions of these Acts may be applied to enjoin purely private activities which require no participation by any agency of the federal government." *Id.* at 1245.

The court then considered the nature of the "undertaking" that was being questioned. The court found that the undertaking was not the license being sought from the federal regulator, which was not named a party, but rather that "the Bank's *undertaking* or project" was the demolition of the structure. *Id.* The court then looked to determine whether the undertaking was federally funded or assisted, and, finding that it was not, concluded that " '[w]ithout such federal funds, the project remains local in nature.' " *Id.* (footnote omitted) (quoting *Ely v. Velde*, 363 F.Supp. 277, 285 (E.D. Va. 1973), *rev'd*, 497 F.2d 252 (4th Cir. 1974)). The court further observed, looking at the regulations and statutes administered by the federal regulator, that there was nothing to indicate that the regulator had authority to regulate demolition of a private building. As a consequence, the Seventh Circuit reversed the decision of the lower court. *Id.* at 1246.

(c)

In a single-judge opinion denying an application for an injunction pending appeal, Judge Sobeloff of the Fourth Circuit Court of Appeals was confronted with a claim of "preservationists" seeking to stop the demolition by the owner of an old railroad station listed on the

National Register. *Miltenberger v. Chesapeake & Ohio Ry.*, 450 F.2d. 971, 972 (4th Cir. 1971). In reviewing the reach of the NHPA and the NEPA, the judge found that the station had been abandoned by the railroad as a station, and was thus not subject to the jurisdiction of the National Railroad Passenger Corporation ("AMTRAK"). *Id.* at 974. Even assuming that AMTRAK had jurisdiction to stop the demolition, the court found that AMTRAK was essentially a private corporation, and the fact that AMTRAK received federal funds did not make it a federal agency for NEPA or NHPA purposes, since such indirect federal financial assistance would have the unintended impact of making any "private corporation subject to governmental aid . . . [a] 'federal agency.' " *Id.*

(2)

(a)

A principal case relied upon by the plaintiffs and the intervenor is *Friends of Shawangunks, Inc. v. Clark*, 754 F.2d 446 (2d Cir. 1985). In *Friends*, the Second Circuit Court of Appeals was faced with a suit brought by an environmental group challenging the proposed construction of a golf course on land for which the government had provided funds pursuant to the LWCFA for the acquisition of a "conservation" easement. The public had no access to the land underlying the original easement, inasmuch as such land was owned in fee by private individuals. The fee owner, however, was prohibited from developing the property beyond the uses existing at the time, which included a then-existing nonoperating golf course and pro shop. A hotel chain desired to develop the land, and

sought to have the easement amended. Among other things, the amended easement would have allowed the construction of a golf course and would have made much of the land available to the public for the first time. *Id.* at 448. The regional director of the Park Service concluded that no conversion took place by the amendment to the easement and therefore that no federal approval was required. Suit was commenced, and the district court held that the amendment to the conservation easement was nothing less than a bonus to the public, and did not constitute a conversion. *Id.* at 449.

The circuit court reversed. The Court first found that a conversion had taken place, requiring federal approval, *id.* at 451, because the conservation easement was intended to "prevent further development of the land underlying the easement." *Id.* at 450. By the amendment, the local authorities would be conveying away their right to control development and thus conversion of the easement would take place. *Id.* at 451. Moreover, the court found that even if a conversion would not take place, since the change in the easement significantly altered the original utility of the easement – control of future development – the basis for the original funding was called into question, and federal government approval was required. *Id.* at 452.

(b)

The second principal case relied upon by the plaintiffs and the intervenor is *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271 (3d Cir. 1983). In that

case, in 1968 the Secretary of Housing and Urban Development ("HUD") approved an urban renewal plan submitted by the Town of Dover. As a part of the plan, the Old Stone Academy was slated for demolition. In 1969, HUD and the Town of Dover signed a loan and capital grant contract to provide the funds necessary to carry out the urban renewal plan. As a part of the plan, the Town of Dover Redevelopment Authority ("TDRA") a corporate body created by the Town of Dover acquired the Academy in December of 1978. On July 7, 1980 the TDRA voted to demolish the academy. The loan from HUD to the Town was closed out on April 16, 1982.

The Academy was listed on the National Register on May 21, 1982, but the court found that it was eligible for inclusion as early as 1976. Since Congress amended NHPA in 1976 so as to require federal agencies to consider not only listed historical sites, but also sites eligible for listing, the district court concluded that HUD had ongoing jurisdiction, by virtue of the unclosed loan, from 1976 to 1980, the latter being the last year when the Town submitted data to HUD in the form of reports, to consider the impact of the demolition of the Academy and should have consulted under section 106 with the Advisory Council. *Id.* at 281-82. (The lower court also addressed NEPA issues, and came to a similar conclusion based upon similar reasoning insofar as NEPA was concerned. *Id.* at 278.)

The circuit court essentially adopted the reasoning of the lower court and held that under both the NHPA and the NEPA that these statutory schemes are applicable to federal agencies as long as a federal agency has authority during the undertaking to alter the impacts on historic

properties or the environment. *Id.* at 278, 282. Thus, the court reasoned that the NHPA or NEPA responsibilities of federal agencies exist, not only at the time of the initial grant decision, but during any time the federal agency has continuing authority over the project. *Id.* Thus, HUD was obligated to comply with the NHPA and the NEPA, and the district court's injunction was affirmed. *Id.* at 282.

(c)

The next case principally relied upon by the plaintiffs and the intervenor is *Fill the Pool Committee v. Village of Johnson City*, No. 82-CV-762 (HGM) (S.D.N.Y. Aug. 19, 1982) (memorandum-decision and order granting a preliminary injunction), an unpublished opinion. In that case, in which the Park Service was not a defendant, on July 20, 1982 the Village of Johnson began to demolish a pool which was eligible for listing in the National Register. Although the pool had been built in 1927, the Village had acquired monies under the LWCFA in 1968 to acquire the park and pool situated in the park. After the 1968 acquisition, the pool fell into a state of disrepair, and, the pool was closed. As time went on, the village was confronted with a threat by its insurer to cancel insurance unless the pool was either destroyed or the the pool was secured from vandals and from the possibility of falling building materials. The village then commenced demolition.

The district court, among other things, found that the contract which the village signed when it obtained the LWCFA monies prohibited conversion. Accordingly, even though the grant was long closed, the village would be

enjoined until the village could show compliance with with the NHPA. In order to show compliance with the NHPA, the court reasoned that the Park Service would have to approve the "demolition," such approval would constitute an undertaking, and therefore the Advisory Council would be entitled to comment under section 106 of the NHPA. In reaching this conclusion, the court relied upon a communication from the Park Service, which memorandum outlined the steps which would have to be taken by the village in conformity with the NHPA, and accordingly, the court followed the Park Service interpretation of the statute which the Park Service was charged with administering.

C.

One of the issues which arose during the trial of the case at hand was which LWCFA grants manual was to be applied to the LWCFA grant contract. The contract in 1978 incorporated a grants manual into the agreement between the predecessor of the Park Service and the State of Nebraska. (Exhibit 217, p. 6, para. L). This contract provision provides: "The State shall comply with the policies and procedures set forth in the Bureau of Outdoor Recreation Manual. Said Manual is hereby incorporated into and made a part of this agreement." (Exhibit 217, p. 6, para. L).

I received into evidence Exhibit 282, also referred to as Exhibit 2003, which is the spring 1978 grants manual. I refused the offer of Exhibit 217(G), the current grants manual, because, to the extent that it differed from the manual in existence at the time of the 1978 contract, there

was no evidence from which I could conclude that the parties to the contract intended to give the federal agency the unilateral authority to amend the contract by revision of the grants manual. My judgment in this regard is in accord with the practice of the Park Service as testified to by Mr. Kenneth Compton, the Chief of the Recreation Branch, Midwest Regional Office of the Park Service. (Vol. II, TR 336:23-343:23). My ruling is also consistent with opinion of the United States Department of the Interior, Office of the Solicitor (Exhibit 2018).

I gave the plaintiffs and the intervenor an opportunity to show why the most recent grants manual should be received for some purpose other than to establish the terms of the contract, and they failed to set forth any logical reason. (Vol. II, TR 399:24-402:24; 491:21-492:23; 990:16-991:13). (It should be noted that in their pretrial brief, the plaintiffs and the intervenor took the position that this "issue [is] primarily academic in any event" because the contract is governed by the LWCFA statutes, the statutes remained constant, and the "provisions of the Manual are not significantly different." Trial Brief of Plaintiffs and Intervenor at 6-7.)

Accordingly, I have not applied the recent manual to the facts of this case. In particular, I have not applied section 650.4.3.C of the recent manual, (Exhibit 217G). Therefore, the first argument advanced by the plaintiffs and the intervenor regarding the park is not applicable, because the the manual upon which they rely was not received in evidence. In any event, the application of the current manual would not have materially changed .the views expressed in these findings and recommendations.

III.

There was no evidence to suggest any involvement with the ICC and this project (Exhibits 340, 2022). Mr. Edward Fogarty, counsel for Proud and Mercer Management Company, candidly told me that no trackage that touches the boundary of the Canyon is subject to ICC approval. (Vol. I, TR 28:5-9). Moreover, Mr. Fogarty told me that the removal of the one track which he thought was subject to ICC approval would not disrupt service to the shippers served by the track. (Vol. I, TR 30:19-23). Mr. Dennis Duffy, a railroad employee, testified that the track, the "side hill lead" which the plaintiffs and intervenor claimed required ICC approval prior to change, was an "industrial" track, (Vol. II, TR: 484:21-485:1), and that service to shippers would not be curtailed, (Vol. II, TR 483:23-484:2), by the relocation. The portion, about one-half of a mile, of the "side hill lead" to be "abandoned" is located solely within the State of Nebraska (Exhibit 292). Relocation of "industrial" tracks, within one state, where shippers continue to receive service, does not require a license or permit or approval from the ICC. *Simmons v. ICC*, 808 F.2d 22, 24 (7th Cir. 1986) (rerouting resulting in cessation of a fifteen mile segment of track did not require an abandonment application where a shipper would continue to receive service). Indeed, 49 U.S.C. § 10907(b)(1) provides that the ICC has no authority to regulate the abandonment of this type of track if it is located or intended to be located in one state.

Moreover, even if the ICC were or should be involved in some way, which at this point is gross speculation, on the record before me there is no evidence to conclude that, (a) such federal action would be a legal

condition precedent to the implementation of the entire project, or, (b) that the ICC could exercise such factual control over the "federal portion" of the project that the ICC would be required to consider project-wide environmental or historic preservation issues, such as those relating to the Canyon. *See Ringsred v. City of Duluth*, 828 F.2d at 1307-08; *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d at 272-73. This being so, the involvement with the ICC would be incidental and would not require or permit NHPA or NEPA action by the ICC insofar as the Canyon is concerned. *Id.*

IV.

I turn next to consider the involvement of the Corps.

A.

Mr. John Morton of the Corps does have federal regulatory authority pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 and section 10 of the River and Harbor Act of 1899, 33 U.S.C. § 403, to issue licenses or permits, but he testified, without contradiction, that the project did not require such licenses or permits. (Vol. I, TR: 261:22-265:7). Even if the project required a section 404 or section 10 permit, our circuit has made it clear that these types of permits do not authorize the Corps to do a project-wide review of the nonfederal portion of the project. *Winnebago Tribe*, 621 F.2d at 272. *Accord Ringsred*, 828 F.2d at 1308-09. (I decline to follow *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1430-31 (C.D. Cal. 1985), because *Marsh* expressly ignores and contradicts the teaching of *Winnebago Tribe*, which is binding in our

circuit.) Jobbers Canyon is under the control and ownership of the ODF. (Vol. I, TR 91:8-92:9), which is a private nonprofit corporation. (Vol. I, TR 84:9-18). There is no evidence that the ODF acquired the Canyon with a federal license or permit or assistance, and there is no evidence that the demolition of the Canyon requires a federal license or permit or assistance. Therefore, even if a section 404 or section 10 permit were required, the Corps would have no jurisdiction to consider the nonfederal portion of the project, which would include Jobbers Canyon.

B.

The only federal employee who testified that he had any "control" regarding the redevelopment project said that he had no authority to permit or license the redevelopment or Jobbers Canyon. (Vol. IV, TR 984:16-985:1). Mr. LaRandeau testified that his office – responsible for supervision of the operation and maintenance of the levee by the Corps – could require the city to submit any plans for realigning the sewers or other structures to his office for design approval *if* the City wanted the sewer or other structure to interface with the levee, but this authority was expressly limited to the levee right-of-way. (Vol. IV, TR: 957:3-10; 972:2-18) (Exhibit 293, paras. 2.3(5), 5.2.1; Exhibit 293A). The right-of-way is outside of, and east of, the Canyon. (Vol. IV, TR: 971:14-22; Exhibit 293A; Exhibit 201, p. 2, fig. 5). Indeed, although it is not perfectly clear, it appears that the right-of-way is outside the boundaries of the redevelopment area (Exhibit 201, p. 4 and fig. 5), although this finding is not crucial. The testimony was that certain sewers would

be realigned and would, as they had in the past, intersect with the levee. (Vol. IV, TR: 926:1-930:13) (Exhibits 289 and 341). However, the testimony was that the realignment will not increase the effluent discharge, (Vol III TR: 656:14-18), and basically all that would happen is that the "internal connects" would be changed, without material change occurring to the distribution system to the river. (Vol. III, TR 657:4-19).

The ground upon which the levee sits is owned by the city, (Vol. IV, TR: 986:4-13), and the levee is operated pursuant to the operations manual – essentially an agreement between the city and the Corps, (Exhibit 293), in which both the city and the Corps seem to share responsibilities. (Exhibit 293, sections I and II). The Corps has legal capacity to supervise the operation of the levee pursuant to the manual, (Exhibit 293), because the city, as the responsible plan sponsor for the construction of the levee, must operate the levee in accord with the regulations adopted by the Corps. 33 U.S.C. § 701c(c).

This type of federal "approval" is incidental to, and not a legal condition precedent of, completion of the entire redevelopment, as the Corps' authority is certainly not project-wide, but rather is limited by the plain wording of the statute to approval of design specifications of sewers or other structures which intersect the levee. *Id.* Ecological, and presumably historical, concerns have been held not to be within the "zone of interests" protected by 33 U.S.C. § 701c. *Akers v. Resor*, 339 F. Supp. 1375, 1377-78 (W.D. Tenn. 1972). It further appears that the Corps has very little discretion over the "federal" portion of the project, since its authority is fundamentally limited to approving a design which will have no impact

upon the levee in the first place. (Also it seems that the City could simply not change the sewer, and thus avoid the Corps altogether.) Moreover, there is no evidence that the Corps has given, or will give, any direct financial aid to the redevelopment project. Finally, as noted, the overall federal involvement of the Corps on the redevelopment project is extremely limited, and the Corps has no relationship whatever with the ODF, which controls the Canyon. Since the ODF could demolish the Canyon without the Corps' approval, and since the Corps' involvement with the entire project is so limited, even if the Corps had to conduct some type of environmental or historical assessment, the Corps' review jurisdiction would be limited to the levee and would not include the Canyon. *Ringsred v. City of Duluth*, 828 F.2d at 1307-08; *Winnebago Tribe*, 621 F.2d at 272-73.

The plaintiffs and the intervenor also contend that a pedestrian overpass would be built touching the levee. (As nearly as I can tell, this would be a viewing stand so folks could view the Missouri River.) At best, the information provided to me in this regard suggests that the pedestrian overpass is nothing more than a possibility that the designer intended to leave open and study. (Vol. III, TR:618:25-619:3; 619:21-620:11; 620:24-621:4; 621:7-622:1; 625:24-626:15; 626:21-24). In any event, assuming the building of a pedestrian overpass touching the levee or the right-of-way, on the record before me, the same analysis suggested above regarding the sewers is applicable to the optional pedestrian overpass; therefore, the Corps' review authority would not extend to the entire project.

I also note that the plaintiffs and the intervenor contend that building the lake in Central Park East would invoke the Corps' jurisdiction. There is no evidence that the lake would intersect the levee or touch upon the levee right-of-way, and, on the contrary, it appears that the lake would not intersect the levee. (Exhibits 201, fig. 5; 203; 293) (Vol. IV, TR: 971:14-22). As a consequence, the Corps does not believe that it has the authority to regulate the lake. (Vol. IV, TR 951: 21-23; 983:14-19). In any event, assuming that the lake touched the levee or the right-of-way, on the record before me, the same analysis regarding the sewer is applicable to the lake; therefore, the Corps' review authority would not extend to the entire project.

V.

As previously noted, most of the evidence and argument in this case dealt with Central Park East and the Park Service's obligations under the LWCFA. The arguments of the plaintiffs and the intervenor are complex and require a lengthy recitation of the facts for one to fully understand the parties' positions.

A.

(1)

Sometime in 1978, Douglas County began preparing information to be used to obtain federal funds for the acquisition and development of a park in an area between 10th Street on the west, the railroad track by the levee on the east, Douglas Street on the north, and Howard Street on the south. The evidence with respect to who prepared

what and when on behalf of the county, the State of Nebraska, or the Park Service is vague at best. This ambiguity is apparently due in part to the passage of time, the fact that the Park Service changed its office from Denver to Omaha, and because the County could not locate its file.

On May 15, 1978, George Buglewicz, Chairman of the County Board of Commissioners, wrote to Eugene Mahoney of the Nebraska Game and Parks Commission, stating:

> Transmitted herewith are the program narrative and environmental assessment comprising Douglas County's application for $300,000 from the Secretary of the Interior's Contingency Reserve of the Land and Water Conservation Fund. An authorizing resolution is included. This application is for land acquisition only. Rail relocation and consolidation and development are separate projects which will be completed as quickly as funds become available.

(Exhibit 218K).

(2)

Oliver Wolff, who forwarded the state's application for the County to the Park Service, identified the following documents as ones that he had in his file and forwarded with those furnished by the county: Central Park East Funding, (Exhibit 218B); the State Comprehensive Outdoor Recreation Plan ("SCORP") analysis prepared by Mr. Wolff's office, (Exhibit 218F); Letter from Governor James Exon to Cecil Andrus, Secretary of the Interior, dated May 18, 1978, (Exhibit 218G); Letter dated

May 15, 1978 from Governor Exon to Derrell Thompson, Regional Director of the Heritage Conservation and Recreation Service, transmitting an application of Douglas County for $300,000 in current year's funds from the Secretary of Interior's Contingency Reserve of the Land and Water Conservation Fund, (Exhibit 218H); Selection Criteria Analysis, (Exhibit 218I); Phasing and Cost Estimates, (Exhibit 218J); and a map, (Exhibit 218(O).

Mr. Compton testified that the following documents contained in his file were required as part of the application: the basic contract, (Exhibit 217, pp.1-6); Project Approval Information, (Exhibit 217, pp.8-10); the Environmental Assessment, (Exhibit 217, pp.12-16); the Program Narrative, (Exhibit 217, pp.22-23); Application reviews by the State Director of Planning and Programming, (Exhibit 217, p.24), the State Historic Preservation Officer, (Exhibit 217, p.26), and Metropolitan Area Planning Agency ("MAPA"), (Exhibit 217, pp.27-28); State Assurance of Compliance with the Civil Rights Act of 1964, (Exhibit 217, p.25); the Federal environmental assessment determination, the "Negative Declaration," (Exhibit 217, p.35); SCORP evaluation, (Exhibit 217, p.36); Selection Criteria Analysis, (Exhibit 217, pp.37-40); and the Project Description, (Exhibit 217, pp.88-90) (Vol. II, TR 313:24-322:6).

(3)

The basic contract consists of pages 1 to 6 of Exhibit 217. Both Mr. Compton, (Vol. I, TR 283:13-25), and Mr. Wolff, (Vol. III, TR 529:11-530:16), agree on this matter

The "Project Scope (Description of Project)" is defined on page 1 of the contract as follows:

> Stage 1: Douglas County will acquire 4.12 acres near the Missouri River on the east end of Central Park Mall in downtown Omaha. They [sic] will also relocate existing businesses, demolish old Structures, remove debris and convert the site to open space. (Estimated Cost: $600,000)
>
> Stage 2: Development of the site by relocating utilities and installing landscaping, footpaths, drinking fountains, comfort station, lighting, fencing, pedestrian overpass and street furniture. (Estimated Cost: $900,000)
>
> Any reference to the Bureau of Outdoor Recreation (BOR) contained in the agreement or in any attachments incorporated thereto, shall hereinafter be considered a reference to the Heritage Conservation and Recreation Service (HCRS).

(Exhibit 217).

The agreement indicates that it funds phase one of the project and that "[t]he following attachments are hereby incorporated into this agreement: 1. General Provisions Dated Dec. 1965 [and] 2. Project Proposal." (Exhibit 217, p.1). The general provisions were attached as Exhibit 1, (Exhibit 217, pp.3-6), but there was no attachment of the project proposal, apparently because it is contained on page one under the title "Project Scope (Description of Property)."

The general provisions of the contract specifically define "project" as that "project or project stage which is the subject of [the] agreement." (Exhibit 217, p.3). The only project stage which was funded in the agreement

was the acquisition of 4.2 acres of land east of the Central Park Mall near the Missouri River. (Exhibit 217, p.1, Stage 1). Section L of the general provisions of the contract specifically provides that the Bureau of Outdoor Recreation Manual is incorporated in and made a part of the contract. (Exhibit 217, p. 6). Both Mr. Compton for the Park Service, (Vol. II, TR 336:23-337:23), and Mr. Wolff for the state, (Vol. III, TR 541:19-25), agree that the manual which is incorporated is the one in existence as of the date the 1978 contract was executed. This is in keeping with the opinion of the Assistant Solicitor, Parks and Recreation, Department of the Interior. (Exhibit 218). The documents which are obviously integrated in the contract are the two pages which constitute the basic contract, (Exhibit 217, pp.1-2), the general provisions attached thereto, (Exhibit 217, pp.3-6), and the Bureau of Outdoor Recreation Manual as it existed on June 16, 1978. (Exhibit 217, section L; Exhibit 282). There is no testimony of any witness who participated in negotiating the contract that any other document was intended by any party to the contract to be integrated into or made a part of the contract.

(4)

The first amendment to the contract was executed on June 4, 1979 and made the following five specific changes in the contract: (1) the project period was extended from June 30, 1979 to December 31, 1980; (2) stage 2 and adding earth fill were added to the scope of the project; (3) the cost of stage 1 was increased from $600,000 to $1,500,000; (4) the assistance for stage 1 was increased

from $300,000 to $750,000; and (5) references to the Bureau of Outdoor Recreation ("BOR") in the original agreement and attachments was changed to "hereinafter be considered a reference to the . . . HCRS." In all other respects, the original agreement was to remain in full force and effect. (Exhibit 217A).

The second amendment to the contract was executed on October 15, 1980 and contained two specific changes in the agreement: (1) the project period was extended to December 31, 1982; (2) the project scope was amended through adding " 'by negotiation and donation' after 4.12 acres and picnicking and support facilities." In all other respects, the agreement was to remain in full force and effect. (Exhibit 217B).

The third amendment to the agreement was executed on September 30, 1981 and made two specific changes in the agreement. The land acquisition was increased to about sixteen acres, and a lake development was added to the project scope. Any reference to the HCRS or the BOR contained in the project agreement "shall hereinafter be considered a reference to the National Park Service." In all other respects, the agreement was to remain in full force and effect. (Exhibit 217C).

The fourth amendment to the agreement, executed on November 30, 1982, extended the project period to December 31, 1983. (Exhibit 217D). The fifth amendment, executed on December 3, 1984, was also an extension of the project period to December 31, 1984. (Exhibit 217E).

The final amendment, executed February 6, 1986, deleted from the project scope: relocation, picnicking facilities, lake development, utility relocation, landscaping,

footpaths, drinking fountains, comfort stations, lighting, fencing, pedestrian overpass and street furniture. (Exhibit 217F). This was necessary because there were not sufficient funds necessary to do the stage II development items. (Exhibit 217F, p.4).

(5)

Contract 31-00507 between the State of Nebraska and the Park Service was closed out. The LWCFA Final Compliance Onsite Inspection Report was made by Mr. Wolff on October 21, 1985, and all the work was completed in conformity with the grant agreement and amendments, according to Wolff. (Exhibit 229). In that report, Wolff indicated that the 6(f)(3) boundaries had remained intact. (Exhibit 229). He based that conclusion on his personal assessment that "[t]here was no encroachment on what appeared to be the land we had assisted in acquiring." (Vol. III, TR 536:23-24). The final project billing was made on December 31, 1985. (Exhibit 230). A complete audit of the project was made on January 3, 1986. (Exhibit 231). Final payment was made to the county on February 6, 1986. (Exhibit 232). On February 19, 1986, Mr. Grasso, the Land and Water Conservation Fund Project Officer for Project 31-00507, on behalf of the Park Service, advised Mr. Mahoney, Director of the Nebraska Game and Parks Commission, by letter as follows:

> Please consider this correspondence official notice that all necessary final documents have been received and found acceptable for the following Land and Water Conservation Fund Project element(s):

31-00507 – D/Central Park East

Receipt of this correspondence constitutes completion of element close-out requirement.

In accordance with the L&WCF Grants-in-Aid Manual, we wish to point out that actual expenditures are subject to verification by audit and the elements are subject to an onsite inspection by the National Park Service at any time. Additionally, element records must be retained by the grantee for 3 years after the date of final reimbursement.

(Exhibit 233).

(6)

Paragraphs B.3, B.6, B.8, and I.1 of the contract between the State and the Park Service are the paragraphs about which the plaintiffs and intervener primarily argue; these paragraphs provide:

B. Project Execution

. . . .

3. The State shall secure completion of the work in accordance with the approved construction plans and specifications, and shall secure compliance with all applicable Federal, State, and local laws and regulations.

. . . .

6. All significant deviations from the project proposal shall be submitted to the Director for prior approval.

. . . .

8. The acquisition cost of real property shall be based upon the appraisal of a competent appraiser. The reports of such appraisers shall be available for inspection by the Director.

. . . .

I. Use of Facilities

1. The State shall not at any time convert any property acquired or developed pursuant to this agreement to other than the public outdoor recreation uses specified in the project proposal attached hereto without the prior approval of the Director.

(Exhibit 217, pp. 1-6).

In this regard, the plaintiffs and the intervenor draw the court's attention to section 685.2.1 of the grants manual, which provides in pertinent part:

> Property acquired or developed with assistance from the Fund shall be retained and used for public outdoor recreation. Any property so acquired or developed shall not be wholly or partly converted to other than public outdoor recreation uses without the approval of the Director. . . . Such approval will be given only upon such conditions as the Director deems necessary to assure the substitution of other outdoor recreation properties of at least equal fair market value and of reasonably equivalent usefulness, quality and location.

(Exhibit 282, section 685.2.1).

The federal defendants particularly draw the court's attention to section 640.2.8 of the grants manual which makes it clear that: *"It is not necessary that the eventual*

development of the land acquired with Fund assistance be carried out with Fund assistance, or that such unassisted development be approved by [the federal agency] as long as it is in accord with the purposes for which the acquisition was made." (Exhibit 282, section 685.2.1).

(7)

As one might expect, there are various statements made either before this litigation was commenced, or a while the litigation was in progress, that each party suggests indicate the inconsistent position of the other. In large measure I have discounted the significance of these admissions because I believe they represent the preliminary views of the writer and speaker, often times made with little background information. In other cases, these statements are not indicative of the true position of the author if read in context with other documents. Some of the more important statements are as follows.

The plaintiffs and the intervenor point to a "Program Narrative," (Exhibit 217, pp. 22-23), which accompanied the application and which contemplated that in the future it was the hope of the county that Jobbers Canyon could be developed into mixed retail, office, and residential use, providing a population for use of the park by about 5000 people. On the other hand, the defendants point to the so-called Omaha Central Business District Plan ("CBD"), (Exhibit 216), which was cited in the "Annotated Bibliography," (Exhibit 218M), which bibliography was submitted with the application, and which plaintiffs and intervenor cite for the proposition that maintenance of

Jobbers Canyon was always contemplated. The defendants point out, however, that the Omaha CBD states in part that the some of the warehouses "will not prove to be restorable because of the factors of economics and market," that final design of the riverfront development cannot be accomplished "until some of the buildings that currently exist are ear-marked for demolition," and only a couple of hundred dwelling units could be developed in the near future. (Exhibit 216, p.88).

Before the agreement on redevelopment was completed and signed, during the process of negotiation, Mr. Shukert, then the City of Omaha Planning Director, wrote a memorandum dated October 9, 1987, (Exhibit 251), to the Mayor of the City of Omaha expressing Mr. Shukert's concern about the negotiations with ConAgra with regard to the development of Central Park East, which memorandum states in pertinent part:

> ConAgra apparently wants to control the nature of development in the park. . . . My concern is that control over "architecture" could extend to control over activities and uses in the park. Since the park development is one of the keys for public participation in the project, we must retain control over our land. I don't object to architectural review if it is legal. However, ConAgra cannot be in a position to limit uses of the Park.
>
> . . . .
>
> As you know, I have always had mixed feelings about this project. I consider the loss of the Jobber's Canyon to be a serious loss to the city, although I know many people don't share that belief. I have rationalized this on the basis of: 1) the public benefit of completing the Central

> Park Mall and Riverfront Park; 2) the need to retain a major corporate employment base in downtown and the consequences of more hemorrhaging of office employment to our other downtown plans and projects; and 3) the possibility of establishing a self-sustaining development market in downtown. I regretfully believe that the scales of costs and benefits are tipping the other way. ConAgra, perhaps understandably, clearly wants *total* control of and limited public access to its immediate environment. The company controls it could have that control at a suburban site [sic]. However, such control runs counter to the original Central Park East concept and to the overall sense of a city. Central Park East was originally considered a people place, like other waterfront projects in cities like Baltimore and Minneapolis. Now, it has changed into a private corporate campus, to be viewed by our citizens from afar.

(Exhibit 251).

At trial, however, Mr. Shukert, who struck me as believable, brilliant, and, magnificently educated (having received his Bachelor of Arts degree in City Planning from Yale, where he was a member of Phi Beta Kappa, and his Master's degree in Architecture from the University of California at Berkeley (Vol. I, TR 171:23-172:3)), made it clear that these concerns were concerns he had during negotiations, which concerns were alleviated by the ultimate Redevelopment Agreement. He stated: "The memorandum reflected a situation of negotiations at a given time. . . . I believe that the park as it is currently designed will be not only a distinguished park but also is fully in compliance with the original intention of park development." (Vol. I, TR 172: 23-24; 173:1-4).

Likewise, Mr. Compton (who struck me a credible, competent, and objective), a Park Service supervisor (who was a longtime employee of the Park Service, stationed at various times throughout the country, holding Bachelor of Science and Master of Science degrees from Rutgers University), and the principal person responsible for LWCFA compliance, allowed (apparently pursuant to a delegation of authority procedure in the Park Service, (Vol. IV, TR 410:13-412:5), a letter to be sent to the State, (Exhibit 241), on March 11, 1988, signed by a subordinate over the typewritten designation of Mr. Compton's name. The letter, which stated a number of concerns, appears to be dated before the redevelopment agreement was signed, and states in pertinent part:

> In order to avoid unnecessary delays, early coordination between ourselves, the State, and the local units of government involved is essential. Douglas County and the city of Omaha should be made aware of the following compliance issues:
>
> 1. The type and extent of development outside the boundaries of Central Park East may be such that the recreational integrity of the park, itself, will be compromised. This would constitute a conversion of use under Section 6(f)(3) of the L&WCF Act, as amended. Enclosed is a United States Court of Appeals' decision that may have application to the Central Park East situation. We are unable at this time, lacking sufficient information on the Riverfront Redevelopment Project, to determine whether or not this may be the case.
>
> 2. An architectural review committee has been proposed (the Omaha City Planning Board has suggested that it consist of representatives form the city; the Omaha Development Foundation;

ConAgra; Landmarks, Inc.; and "a planner of national prominence"). This proposed committee would have no veto power over the development of Central Park East. As a condition of the L&WCF grant, Douglas County is to maintain adequate control over the project site. We are very concerned that Douglas County would relinquish control over Central Park East to the proposed architectural review committee, in contravention of L&WCF program requirements.

3. From what we have learned about the proposed Riverfront Redevelopment Project, access to Central Park East from the west would either be severely limited or made impossible by ConAgra. Adequate public access to the park is a must; both we and the State must insist that such access be part of the final plan for the Riverfront Redevelopment Project.

4. There has been speculation that the remains of 19th century river boats may be found when the proposed lake is excavated for Central Park East. If such remains are found, historic preservation provisions found in Chapter 650 of the "L&WCF Grants Manual" must be followed. Any development delays this may cause are unavoidable.

5. On September 19, 1986, we wrote to you concerning the need for the establishment of "a logical Section 6(f)(3) boundary for Central Park East". . . . To effect this end, several actions were required of the county and the city. . . . In the intervening 16 months, the above local units of government have not acted to establish a rational boundary for the park.

Please convey our above concerns to the project sponsor and to the city. It is essential, if the

> Riverfront Redevelopment Project and the development of Central Park East are to be realized in a timely manner, that all parties involved – Federal, State, and local – work together and communicate effectively. Your efforts to this end are most appreciated.
>
> Sincerely,
>
> [signed by a subordinate to Mr. Compton]
>
> Kenneth R. Compton
>
> Chief, Recreation Grants Division

(Exhibit 241, Letter from Kenneth R. Compton, Chief, Recreation Grants Division, National Park Service, to Oliver E. Wolff, Federal Aid Administrator, Planning and Programming Division, Nebraska Game and Parks Commission (received Mar. 14, 1988)).

However, Mr. Compton, after reviewing the letter, testified, among other things, that the letter was overzealous in part and that in other parts he could not find "legal jurisdiction" for the statements contained in the letter. (Vol. II, TR 377:19-23). After Mr. Compton had a chance to actually review the Redevelopment Agreement, he testified at trial that the "Architectual Review Committee . . . does not have jurisdiction over Central Park East," (Vol. II, TR 443:17-24), that the Redevelopment Agreement does not constitute or cause a conversion of the Park under the LWCFA (Vol. II, Tr 448:7-449:9), that the section 6(f)(3) boundaries of the park were set when the property was purchased, and that a plat map was not required at the time of the initial LWCFA grant. (Vol. IV, TR: 374:1-375:15).

The defendants also refer me to various letters and a telephone call, memorialized by a memorandum prepared by the recipient of the call, to suggest that even the Advisory Council does not believe that there is federal involvement with this project. Mr. Robert Fink, Chief of the Western Division of Project Review for the Advisory Council, began to write letters to various federal agencies, after he learned of the project, attempting to prompt section 106 review, (Exhibits 1013, 1014, 1015 and 1016), after the Nebraska State Historical Society solicited action from the Advisory Council. (Exhibit 1012). After apparently receiving responses from the various federal agencies, Mr. Fink told Lynn Meyer of the City's Heritage Preservation Commission that the Advisory Council sent the letters out as "a longshot," that normally the Advisory Council did not go around reminding sister federal agencies of their responsibilities, and that "two ingredients are necessary to trigger Section 106 review: federal involvement and historic properties. . . . [I]t appears that we presently have the latter, but not the former." (Exhibit 1019, Memorandum from Lynn Meyer to Landmarks Heritage Preservation Commission). Mr. Fink acknowledged that the memorandum fairly represented his statements to Mr. Meyer. (Exhibit 1032, Deposition of Robert Fink, 52:15-22).

The plaintiffs and the intervenor point out that Mr. Fink's supervisor, Dr. King, through the Advisory Council, took a different position about two weeks after Mr. Fink's telephone call, (Exhibit 247, p. 2), that Dr. King normally looks at the more sensitive cases, and that Dr. King was ultimately assigned to the case. (Exhibit 245, Deposition of Dr. King, 716-72:8).

(8)

One of the principal arguments regarding "conversion" of LWCFA lands acquired for the park regards the manner in which the parties have decided to finance the development of the park. I shall briefly describe the scheme for raising money.

The park is a formally dedicated public park; in the 1985 ordinance which dedicates the park, the county recognized that LWCFA funds were used, that the grant contemplated dedication as a public park and proclaimed, as a matter of law, that the ground is "dedicated for use by the public as a public park and outdoor recreation area." (Exhibit 1011). After the redevelopment agreement became a reality, the county wanted to finance the development of the park, but did not want to use federal monies; rather, the county chose to rely upon specific state statutes to develop a method to finance the scheme. Accordingly, the county adopted a resolution implementing the scheme and indicating, among other things, that: (a) the ODF would issue seven million dollars of bonds to develop the park; (b) the ODF would issue two million dollars worth of grant anticipation notes in anticipation of the county receiving certain private gifts of money; (c) the ODF would enter into a trust indenture with a commercial bank providing for payment of the bonds; (d) the ODF would "lease" the ground from the county, and the county would lease back the ground from the ODF, thereby providing an income stream to pay the bonds; and (e) the park would be used by the county "as a public park serving Douglas County, Nebraska." (Exhibit 207).

This resolution, (Exhibition 207), explicitly recognized certain Nebraska statutes, including section 23-820 of the Nebraska Revised Statutes. This statute authorizes counties in Nebraska to enter into agreements for the redevelopment of a park; however, this statue limits the power of the counties to engage in this activity "only for the express purpose of acquiring, holding, improving and operating any park." Neb. Rev. Stat. § 23-820 (Reissue 1983). Thus, any agreements regarding the park are limited as a matter of law by at least two things: first, the park is by ordinance a dedicated public park, (Exhibit 1011), which must be used by county as a "public park serving Douglas County, Nebraska," (Exhibit 207), and, second, by statute, *id.*, the park can only be used or held as a park.

In order to implement this scheme, the ODF caused the Omaha Riverfront Development Corporation ("ORDC") a private nonprofit corporation, to be incorporated, which had as its purpose the development of Central Park East as a "public park." (Exhibit 213). The county then leased the park ground to the ORDC pursuant to the "Ground Lease Agreement" for a nominal fee. (Exhibit 209). The county then leased back from the ORDC the land and any improvements on the park to "be used by County as a public park"; the county agreed to levy taxes to pay for the improvements; the county had the repair and maintenance obligation; the county had the risk of loss; the ORDC agreed to stand the cost of improvements, and the county agreed to pay rent in an amount equal to the development cost but no more than such costs; and the lease terminated upon payment of the

bonds, with any excess monies then donated by the ORDC to the county. (Exhibit 210).

The ORDC, but not the county, entered into a trust indenture with a commercial bank. (Exhibit 211). The purposes of this indenture was to secure payment of the bonds. Although the ORDC agreed to keep the park rented so as to provide an income stream, the only pledge to the trustee for security for payment of the bonds was "revenue" and "income" derived from the park, i.e., the rent payments. Thus, the ORDC did not pledge the park, rather only the income derived therefrom, and the county, at least on the state of the record here, did not mortgage or encumber the park.

(9)

Going along with the contention of the plaintiffs and the intervenor that the county has lost control of Central Park East, the plaintiffs and the intervenor point to the relationship of the Redevelopment Agreement, and the attached park covenants and redevelopment covenants.

The redevelopment covenants call for a committee to approve certain architectural designs, which committee is comprised of, among others, representatives of the city, Conagra, and the ODF, (Exhibit 202, attached Exhibit 7). The county is not by the terms of the redevelopment agreement or redevelopment covenants obligated to sign the redevelopment covenants, and the Redevelopment Agreement specifically states in section 4.1.8 that "[t]he responsibility to acquire, design and construct the Park, ("Park" meaning "public park," (Exhibit 202, section

1.1)) . . . shall *solely* be that of the County." (Exhibit 202 (emphasis added)).

The plaintiffs and the intervenor assert that the county is bound to follow the architectural review committee's orders regarding the park because the park covenants which the county does sign, (Exhibits 202, attached Exhibit 4), require that the overall design for landscaping generally must be consistent with the redevelopment area. (Exhibit 202, attached Exhibit 4, Section 8 (c)). In the main, however, the park is to be designed according to the "Park Improvement Plan," (Exhibit 202, attached Exhibit 4, sections 6(a) and 8(a), and the "Park Improvement Plan" is defined, (Exhibit 202, attached Exhibit 4, section 1), as the 1983 Henningson, Durham and Richardson plans. (Exhibit 206).

Yet, the expert for the plaintiffs and the intervenor, Dr. Thomas Buchanan, described the 1983 plans as a "continuum" of the original 1978 application, (Vol. IV, TR 781:18-25), which "continuum" became a part of the LWCFA grant by amendment, (Vol. IV, TR: 782:15-23 (stating that "[s]o there were several amendments of change to that contract, to change it to what it was developed into in '83")). Dr. Buchanan expressed no specific criticism of the 1983 plans. (Vol. III, TR 680:23-25 (stating that the 1983 plan had "clear circulation plans"); Vol. III, TR 681:9-12 (stating that the paper was "readily accessible" and was the "focal point for people in the area")). The author of the 1983 plan stated that the plan was essentially consistent with current plans. (Vol. III, TR: 640:642; Vol. III, TR 644:21-645:5 (stating that "[w]e have made very painstaking efforts to try to use as much of the old plan as we possibly could.")).

B.

Three arguments advanced by the plaintiffs and the intervenor are similar: (1) the Central Park East project was improperly closed out as an acquisition project instead of an acquisition and development project which would have required approval, and thus section 106 review, of plans when the park was subsequently developed; (2) the Central Park East contract and amendments call for review, and thus section 106 review, of the development plans; and (3) the Central Park East project was improperly closed out before the required so-called 6(f)(3) boundaries were set, and these boundaries must now be approved, and thus a section 106 review is required.

(1)

First, it is true that the Central Park East project started out as an acquisition *and* development project in scope, although the first funds were programmed for acquisition. The final amendment to the project, (Exhibit 217F), made it clear that development was no part of the project: "When acquisition was complete, there weren't funds available to do the stage II development items. . . ." (Exhibit 217F, p. 4, para. "Justification"). I find no support in the cases, the LWCFA statutes, or the LWCFA regulations to support the conclusion that the Park Service improperly closed out the project as an acquisition project.

(2)

Second, believing as I do that the project was properly closed out as an acquisition project, the "general conditions" regarding development and approval of development plans obviously are a nullity and do not apply. Indeed, unassisted nonfederal development, according to the grants manual, need not be approved. (Exhibit 282, section 640.2.8).

(3)

Third, the plaintiffs and the intervenor complain about the lack of a logical section 6(f)(3) boundary. What they mean to allege is that the boundaries of the acquired property must be set, or "conversion" under the anticonversion provisions of the LWCFA cannot be determined. *See* 16 U.S.C. 460*l*-8(f)(3). As a factual matter, the plaintiffs and the intervenor complain about the lack of an approved plat or site map, which one could use to set the 6(f)(3) boundaries.

There is, however, no evidence that a plat or site map was required by law or regulation, and it affirmatively appears, according to the testimony of Mr. Compton from the Park Service, that no such map was required when the contract was entered into. (Vol. II, TR 347:17-348:16; 374:24-375:15). According to Mr. Compton, it is the project documents, including the description of the land acquired, not a map, that sets the 6(f)(3) boundaries, (Vol. III, TR 367: 1-4; 406:18-25; 413:11-18; *See also* Exhibit 235), and that, although the Park Service used maps, the maps were to be prepared from the project documents. (Vol. II, TR 462:8-463:24). It is quite clear that Mr. Compton of the

Park Service used maps for a visual aid, not to set a boundary. (Vol. II, TR 348:1-23). Mr. Wolff, of the State of Nebraska, agreed with Mr. Compton that the boundary was set by the land actually acquired. (Vol. III, TR: 569:20-23).

Put simply, the plaintiffs and the intervenor have failed to establish any law or regulation which requires that prior to closing out a project that a section 6(f)(3) boundary must be established in the manner claimed. Inasmuch as Mr. Compton is satisfied with the 6(f)(3) boundary, (Vol. II, TR 371:22-372:25), and there is no evidence that the Park Service was required to do something differently, the claim of the plaintiffs and intervenor must fail.

C.

Next, plaintiffs and the intervenor claim that the basis for the original funding has been called into question by changes in Central Park East, and thus the Park Service is required to retroactively review the project, including a section 106 review of Jobbers Canyon.

(1)

The legal predicate for this argument is *Friends*, 754 F.2d at 446-52. I find that *Friends* is not on point as a matter of fact, that the language relied upon by plaintiffs and the intervenor is *dicta*, and that the *dicta* is of questionable validity. In *Friends*, the conservation easement was clearly intended to "prevent further development of the land underlying the easement." *Id.* at 450. By the

proposed amendment, the local authorities would be conveying away their right to control future development and thus, according to the court, a "conversion" of the original easement would take place. *Id.* at 451. Moreover, the court secondly found that even if a conversion would not take place, since the change in easement significantly altered the original utility of the easement – development control – the basis for the original funding was called into question, and federal approval was required. *Id.* at 452.

It is this last holding upon which the plaintiffs and the intervenor rely in the instant case – even if there is no conversion or breach of the contract documents, if a change is important enough then federal approval is required. This holding was pure *dicta;* the court had held that a conversion had taken place, and thus there was no reason to make the second legal conclusion. The second legal conclusion is not supported by any legal authority except general references to the applicable statutes. While it cannot be doubted that the Park Service can review for conversions or violation of the original grant documents, there is simply no legal authority to require the Park Service to review every change in a project which a court, having no expertise with LWCFA, may think calls into question the original basis for the grant. The Park Service, not the court, is the entity charged with administering the grant and yet *Friends* seems to suggest that courts have the legal authority to require the federal agency to make a review, not because of a conversion or violation of the grant contract, but because the court thinks that the change alters the essence of the original project and that, therefore, the Park Service ought to review the project. Maybe the *Friends* court is right that as a matter of policy

an administrator should be charged with such a duty; I cannot find, however, any legal authority for me to impose this policy choice.

(2)

In any event, I find no substantial change in Central Park East that calls into question the basis of the original funding. In *Friends* it must be remembered that the change involved was taking a conservation easement that in essence prohibited development, and rewriting the easement to allow a hotel chain to open up the area to development, including developing a golf course. Here, however, Central Park East was proposed as a public park; it is still proposed as a public park. The so-called "changes" are either minor changes or relate not at all to the park, but rather to Jobbers Canyon, and therefore are not changes in the original basis for the funding.

At best, there is a difference in opinion about the significance of the alleged "changes" between the expert for plaintiffs and the intervenor, Dr. Buchanan, (Vols. III & IV, TR), and Mr. Shukert with the city, (Vol. I, TR), Oliver Wolff with the state, (Vol. III, TR), Richard Niedergeses, the private park designer, (Vol. III), and Mr. Compton, (Vol. II, TR), and James Grasso, (Vol. IV, TR), with the Park Service. It is precisely these types of differences of opinion which are normally left to administrative agencies to sort out – not federal courts. The court has no experience in park planning which would properly justify the court in substituting its judgement for that of Mr. Compton as to whether, for example, a change in location of a park entrance vitiates the underlying basis

for the original grant. (By this I do not suggest that Mr. Compton's decision, or that of any other federal administrator, is free from court review. I only mean to suggest that changes clearly requiring the training of LWCFA grant administrators and supervisors, for purposes of interpretation as to whether the original basis for the LWCFA grant is undone, are matters with respect to which the court must approach with due deference respecting the federal agency charged with LWFCA supervision.)

Turning then to the particular points of attack, I understand from the trial and posttrial briefs of the plaintiffs and the intervenor, *see* Trial Brief of Plaintiffs and Intervenor at 12-13; Post Trial Brief of Plaintiffs and Intervenor at 17-19, the criticisms (control questions relative to the financing scheme and park covenants are discussed later) are as follows: (1) the park if limited to passive recreation; (2) when Jobbers Canyon falls, the population for the park and the "reason for being" of the Park evaporates; and (3) the general design of the park limits access and circulation and the park is not a "people park."

(a)

As to the "passive" versus "active" argument, these terms have no particular meaning – even Buchanan testified to a range of activities that are "active" and which would be allowed by a "passive"restriction. (Vol. IV, TR 746:9-748:15). Mr. Shukert testified that the terms have no real meaning and the park could be used for both "active" and "passive" recreation. (Vol. I, TR 185:23-188:1). I

find no basis to conclude that the "passive" limitation contravenes the original basis for funding. I note that according to Dr. Buchanan, the 1983 plans were a continuum of the 1978 concept, (Vol. IV, TR 781: 18-23), that the 1983 plans according to Buchanan became a part of the LWCFA grant by amendment, (Vol. IV, TR 782:15-23), and the man who prepared the 1983 plans testified that he attempted to follow these 1983 plans closely when preparing the present plan. (Vol. III, TR 640:1-642:25; 644:21-645:5).

(b)

A good deal of time is spent arguing that Jobbers Canyon was an area which the park was intended to serve, and without the Canyon the basis for the funding in the first place no longer exists. This argument begs the question, because there is no evidence that anyone *promised (or agreed as a matter of contract)* that Jobbers Canyon would be renovated as a condition precedent or condition subsequent to the grant, although it was clearly hoped that Jobbers Canyon could be preserved. It seems preposterous to suggest that every time the surrounding environment, which is not physically a part of the land acquired from the grant, changes, that LWCFA grants are called into question.

Even Dr. Buchanan testified that changes in the surrounding environment such as the complete destruction of Jobbers Canyon under some circumstances would not require a project amendment; of course, if no project amendment is required, the original basis of the funding is not called into question. I posed a question to Dr.

Buchanan, asking him to assume that the park was developed and that Jobbers Canyon was developed into apartments, as he thought the original funding contemplated. I also asked him to assume that the Jobbers Canyon apartments burned down. I then asked whether the destruction by burning of the apartments in Jobbers Canyon would require a project amendment. He replied that no amendment would be required. (Vol. IV, TR 784:18-785:5). (Counsel for Conagra put a similar question to the expert and received a similar answer. (Vol. III, TR 715:12-716:1).) The foregoing testimony demonstrates to me that the original basis for the funding is clearly not conditioned on the existence of the Canyon. My conclusion in this regard seems to make sense since the county has never owned, and never promised that it would acquire, the land underlying the Canyon. Put bluntly, a requirement cannot reasonably be read into the LWCFA grant which requires the county to maintain property which it never owned and never promised to buy. In my view, the original basis for funding was to acquire a park for use in downtown Omaha; the land was acquired for the park; the park will be constructed in downtown Omaha; and people in downtown Omaha will be able to use the park. There has been no change in the basis of the funding simply because Jobbers Canyon will not exist.

The plaintiffs and the intervenor rely upon the Opinion of the Solicitor of the Department of the Interior, (Exhibit 283n, pp. 3-4), for the proposition that the " 'entire area identified in the project agreement' is subject to the provisions of the Land and Water Conservation Fund Act and the conditions of the project agreement." (Exhibit 283N, p. 3). The plaintiffs and the intervenor

thus argue that Jobbers Canyon is clearly within the area identified within the project agreement, since the Canyon is referred to in various narratives submitted with the application. I believe that the plaintiffs and the intervenor misunderstand the Solicitor.

The Solicitor did not state that one looks at every document submitted to the Park Service to define the LWCFA project in order to determine whether a conversion has taken place; rather, the Solicitor clearly states that areas defined in the "agreement," (Exhibit 283N, p. 3), the contract "conditions" (Exhibit 283N, p. 3), and documents "incorporated by reference into that project agreement," (Exhibit 283N, p. 4), constitute the areas to be concerned about for conversion purposes. The Solicitor made it clear that "[w]e view the scope of section 6(f) to *be a product of the contractual agreement* between the NPS and the State with regard to the specific project in question." (Exhibit 283N, p. 4 (emphasis added)). Thus, simply because Jobbers Canyon might be described in an environmental or project narrative does not mean that Jobbers Canyon becomes integrated into the contract and therefore a part of the LWCFA project.

(c)

Finally, it is contended that the park design limits access and circulation of people in the park and that the park is not a "people park." However, I note that according to Dr. Buchanan, the expert for the plaintiffs and the intervenor, the 1983 plans were a "continuum" of the 1978 concept, (Vol. IV, TR 782:15-23), and Dr. Buchanan thought that the 1983 plans had "clear circulation plans,"

(Vol. III, TR 680:24-25), and that the park was "readily accessible" and a "focal point for people in the area." (Vol. III, TR 681:9-12). The author of the 1983 plans said that current plans were essentially consistent with the 1983 plans. (Vol. IV, TR: 640:1-645:5). At best, there is simply a difference of opinion, and certainly nothing of significance exists to suggest that there has been a substantial change in the basis for the original funding in this regard.

(d)

The plaintiffs and the intervenor rely upon *Morris County Trust*, 714 F.2d at 271-82, for the proposition that a federal agency must conduct a section 106 review during any time the agency has continuing authority over the project. *Morris County* is inapplicable here, for, among other reasons, the following: (1) the Central Park East federal project was closed out prior to the execution of the redevelopment agreement; (2) Jobbers Canyon, unlike the historic building in *Morris County Trust*, was never a part of the federal project; and (3) there is no basis for reopening the Central Park East LWCFA grant project.

The plaintiffs and intervenor also rely upon *Fill the Pool*, No. 82-CV-762 (HGM) (S.D.N.Y. Aug. 18, 1982) (memorandum-decision and order granting a preliminary injunction). *Fill the Pool* simply has no bearing on this case, although it does stand for the proposition, which is not disputed by anyone, that even after closing a LWCFA grant, the local sponsor must abide by the provisions of LWCFA contract prohibiting conversion. In *Fill the Pool*, the local sponsor was sued by preservationists claiming

the LWCFA funded pool was being destroyed in contravention of an express LWCFA contractual provision. Here, there is no LWCFA grant for Jobbers Canyon and no LWCFA agreement which pertains to the Canyon, let alone prohibits its demolition.

In sum, I find nothing which supports the conclusion that the original basis for the federal funding has been significantly contravened, and, therefore, the *dicta* in *Friends*, if it were the law, is not applicable as a matter of fact.

D.

The principal arguments regarding "conversion" of LWCFA lands acquired for the park regard the manner in which the parties have decided to finance the development of the park, and the restrictions contained in the redevelopment agreement respecting, among other things, the park covenants and the architectural review committee.

(1)

The park is a formally dedicated public park; in the 1985 ordinance which dedicates the park, the county recognized that LWCFA funds were used, that the grant contemplated dedication as a public park and proclaimed, as a matter of law, that the ground is "dedicated for use by the public as a public park and outdoor recreation area." (Exhibit 1011). After the redevelopment agreement became a reality, the county wanted to finance the development of the park, but did not want to use

federal monies; rather, the county chose to rely upon specific state statutes to develop a method to finance the scheme. Accordingly, the county adopted a resolution implementing the scheme and indicating, among other things, that: (a) the ODF would issue seven million dollars of bonds to develop the park; (b) the ODF would issue two million dollars worth of grant anticipation notes in anticipation of the county receiving certain private gifts of money; (c) the ODF would enter into a trust indenture with a commercial bank providing for payment of the bonds; (d) the ODF would "lease" the ground from the county, and the county would lease back the ground from the ODF, thereby providing an income stream to pay the bonds; and (e) the park would be used by the county "as a public park serving Douglas County, Nebraska." (Exhibit 207).

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The ORDC, but not the county, entered into a trust indenture with a commercial bank. (Exhibit 211). The purpose of this indenture was to secure payment of the bonds. Although the ORDC agreed to keep the park rented so as to provide an income stream, the only pledge to the trustee for security for payment of the bonds was "revenue" and "income" derived from the park, i.e., the rent payments. Thus, the ORDC did not pledge the park, rather only the income derived therefrom was pledged, and the county, at least on the state of the record here, did not mortgage or encumber the park.

The basic legal authority for the allegation that this finance scheme constitutes a conversion is found in the

plaintiffs' and the intervenor's interpretation of the opinion of the Solicitor of the Department of the Interior. (Exhibit 283N, p. 8). In that opinion the Solicitor, relying upon a previous opinion, (Exhibit 342), stated, in pertinent part, that a state could not "secure a proposed bond issue with project lands and facilities" and comply with the LWCFA, because "should foreclosure occur, a private party, not an agency of the State or of a local political subdivision, could acquire the property and convert it to other than public outdoor recreation use." (Exhibit 283N, p. 8 (citing opinions of May 22, 1970 and July 15, 1970)).

The Solicitor's opinion is not applicable here for the following reasons.

First, the county has not pledged, and did not "secure," the project lands and facilities to obtain credit from anyone; the only pledge was by the ORDC, and that was a pledge of the income which ORDC derived from the lease. Therefore, there could be no "foreclosure."

Second, even if the county went bankrupt, and the ORDC tried to take possession of the property, according to all the documents, the county ordinance, and the state statute, the park must be operated as a public park, regardless of what happens, and the property could not be converted to "other than public outdoor recreation use." (Exhibit 283N, p. 8). Indeed, the ORDC's only corporate purpose as a nonprofit corporation is to develop the real estate "*for use as a public park* popularly know as Central Park East." (Exhibit 213, art. III (emphasis added)).

Third, when the documents are read together, as they must be in order to make sense, and when the documents

are interpreted in connection with the dedication of the park as a public park by ordinance and by state statute, they contain "clear-cut provisions for adequate control by the governmental unit over the operation to assure public use of the facility on reasonable terms and proper maintenance." (Exhibit 283N, p. 9).

Fourth, even assuming that the plaintiffs and intervenor are correct and that the park would be "converted" upon default by the county, such a conversion has not yet taken place, as there has been no default or evidence that default is imminent. There is virtually no practical difference between what the county has done here, as opposed to the county issuing general obligation bonds which are unsecured. (Here, the county did not pledge the park, and if the county issued unsecured general obligation bonds, it would not pledge the park.) Had the county issued such bonds, and if the county were to go bankrupt, the park would be in essentially the same jeopardy about which the plaintiffs and intervenor complain, based upon the ORDC bond issue. Yet there is not the slightest authority for the proposition that if the county issued unsecured bonds, rather than the ORDC, that the county would somehow have converted the park under the LWCFA. Thus, the alleged "conversion" has not taken place, the county remains in full control of the dedicated public park, and the "conversion" is speculative at most.

Fifth, the financing scheme questioned by the Solicitor, (Exhibit 342, p. 3, Memorandum of Roy K. Wood), was one in which "[t]he participant's source of matching funds for these developments is the bond issue we are discussing." (Exhibit 342). In essence, the Park Service was confronted in Exhibit 342 with an LWCFA grant

application where the Department of the Interior was asked to give money and allow the "matching funds" ("earnest money", so to speak) required of the local sponsor to, in effect, be "borrowed," with the local sponsor giving the subject of the grant as a specific collateral pledge. Here, the matching funds required by the 1978 contract have been paid by the local sponsors. (Exhibit 231, Audit, indicating, for example, that the state's share paid as of January 3, 1986 was over $338,000.00). It is thus questionable whether the Solicitor's opinion is applicable to this type of case, where the Park Service is not being asked to fund the development and has previously received the matching funds for the acquisition.

For these reasons, the finance scheme does not, therefore, constitute a conversion.

(2)

Going along with the contention of the plaintiffs and the intervenor that the county has lost control of Central Park East, the plaintiffs and the intervenor point to the relationship of the Redevelopment Agreement, and the attached park covenants and redevelopment covenants.

The redevelopment covenants call for a committee to approve certain architectural designs, which committee is comprised of, among others, representatives of the City, ConAgra, and the ODF, (Exhibit 202, attached Exhibit 7). The county is not by the terms of the redevelopment agreement or redevelopment covenants obligated to sign the redevelopment covenants, and the Redevelopment Agreement specifically states in section 4.1.8 that "[t]he responsibility to acquire, design and construct the Park

("Park" meaning "public park," (Exhibit 202, section 1.1) . . . shall *solely* be that of the County." (Exhibit 202 (emphasis added)).

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644:21-645:5 (stating that "[w]e have made very painstaking efforts to try to use as much of the old plan as we possibly could.")).

I find that a plain reading of the redevelopment agreement mandates the conclusion that the county has the *sole* responsibility to design the public park, and hence there has been no conversion. I also find that the parameters for the design of the park contained within the Redevelopment Agreement are consistent with the original basis for the LWCFA funding.

VI.

I have spent a great deal of time dealing with arguments about alleged federal involvement with railroad tracks, sewers, and parks. Conspicuously absent has been any discussion of federal involvement with Jobbers Canyon, which is now owned or controlled by a private party, the ODF. On the record before me, the ODF has not asked, and is not required to ask, any federal agency for anything regarding the demolition of the Canyon or the use of the underlying real estate. (Exhibit 106). The ODF has never received any federal assistance regarding Jobbers Canyon. (Exhibit 106). Bluntly stated, there is a complete absence of evidence regarding federal involvement with Jobbers Canyon.

Not one case has been cited to me, and I can find none, which would suggest that this court has authority to order the ODF, a private party, to stop the demolition of Jobbers Canyon, *even if* the ICC, the Corps, or the Park Service had to conduct a full review of the entire redevelopment project. Let me be specific. Until a section

106 review is conducted, the ICC might prohibit removal of the tracks, the Corps might stop the sewers from being changed, and the Park Service might stop development of the park. But any action these agencies might take would be limited to their statutory authorities; none of these agencies have statutory authority of any kind over Jobbers Canyon. Even assuming that such agencies should be forced to consider the impact of what they might do, e.g., development of the park, on Jobbers Canyon, insofar as the ODF is concerned (and ConAgra, for that matter), the agencies do not have any power over the ODF, nor do the agencies have the statutory authority to grant or withhold anything from the ODF regarding the Canyon.

The federal agencies might say that one cannot remove the tracks because of the impact on Jobbers Canyon; the federal agencies might say that one cannot connect the sewers because of the impact on Jobbers Canyon; and the federal agencies might say that one cannot develop the park because of the impact on Jobbers Canyon. The federal agencies, however, have no authority to order the ODF not to demolish the Canyon, since it is the federal agencies which must comply with the NHPA and the NEPA, and not private parties who have no obligation to deal with the agencies in any event.

Certainly, if the ODF were required to seek something, or had sought something, from a federal agency regarding the Canyon, the agency and the court would have the power to control the ODF insofar as the subject of the ODF's involvement with the agency. Thus, in this sense, if a private entity is substantially involved with a federal agency, the private entity subjects itself to the

lawful authority of the agency, to the extent of the jurisdiction of the agency, and, therefore, to the power of this court. But the NHPA and the NEPA do not expand the jurisdiction and power of federal agencies to supervise private conduct not within the jurisdiction of a federal agency in the first place.

The point is that "while [a federal agency] has broad discretion to consider environmental impacts, that discretion must be exercised within the scope of the agency's authority." *Winnebago Tribe*, 621 F.2d at 272 (citation omitted). No federal agency has authority over Jobbers Canyon or the actions of the ODF with regard to the demolition of the Canyon. Here, the ODF is entirely free of federal involvement respecting the Canyon, and there is not even minimal federal involvement which the plaintiffs and the intervenor can point to. The reasoning in *Edwards*, 534 F.2d at 1243-46, and *Miltenberger*, 450 F.2d at 974, is applicable here; the court cannot enjoin purely private action which requires no participation by any agency of the federal government. Thus, without a "federal undertaking" or "major federal action" regarding the Canyon and the ODF, and there is none, ODF is free to "thunb its nose," so to speak, at the NHPA and the NEPA.

For example, one circuit court has held that a state may renounce federal aid, and avoid the NHPA an the NEPA altogether because of the self evident proposition that "NHPA and NEPA, by their very language, impose no duties on the states and operate only upon federal agencies." *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971) ("*Ely* I"). *See Ely v. Velde*, 497 F.2d 252, 257 (4th Cir. 1974) ("*Ely* II") (stating that a state may renounce federal funds, return the funds, proceed with construction without the

assistance of the federal agency, and avoid the NHPA and the NEPA).

In conclusion, if I am in error about federal involvement with the railroad tracks, the sewer and the parks, there is still no evidence involving the ODF, or ConAgra, with federal licenses, permits, approvals, assistance, undertakings, or actions respecting Jobbers Canyon which would justify a federal agency, or this court, in taking any action which would enjoin the ODF, or ConAgra, respecting the demolition of the Canyon.

VII.

I make the following general observations and findings. First, exhibits which I received on condition, subject to my review, are now admitted for whatever value they may have, if any. Second, the plaintiffs and the intervenor have informed my that two issues remain to be resolved: (1) are there private "sub rosa" agreements which would implicate the NHPA, and NEPA, or the LWCFA; and (2) is the title to Central Park East defective, resulting in a LWCFA conversion? The first issue is not subject to resolution by summary judgment, but the second issue is, according to the parties. The defendants inform me that three additional issues remain, if this case is not dismissed: (1) whether the plaintiffs and the intervenor have standing; (2) whether the Trust has the capacity to sue in this case; and (3) whether all indispensable parties are before the court. The parties inform me that these issues can be resolved by summary judgment or other dispositive motion. Accordingly, by separate order, I will

schedule motions for summary judgment, other dispositive motions, and limited discovery, and set forth methods for resolving the remaining issue not subject to summary resolution. I suggest that the court not enter judgment on these findings and recommendations until such time as all remaining issues have been resolved. Next, I have taken under advisement the various oral motions to dismiss, and will keep them under advisement until the remaining issues can be addressed. Finally, trial of the limited issues set forth herein was held pursuant to the provisions of Fed. R. Civ. P. 42(b) (providing for separate trial of separate issues), and I find that such procedure was necessary in furtherance of the convenience of the parties, to avoid prejudice, and to expedite this case.

IT IS THEREFORE RECOMMENDED TO THE HONORABLE WARREN K. URBOM THAT THE COURT:

1. enter judgment, on the limited issues, for the defendants and against the plaintiffs and the intervenor, finding that:

a. based upon the existing Riverfront Redevelopment Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there is no federal funding, federal licensing or other federal involvement requiring a section 106 review under the NHPA, or otherwise implicating the NEPA or the LWCFA;

b. insofar as the ODF and ConAgra are concerned, a section 106 review (or other action required under the NHPA, the NEPA or the LWCFA) could not

result in a federally required retention of one or more buildings in Jobbers Canyon;

2. withhold entry of judgment on these findings and recommendations until all other issues identified in section VII of these findings and recommendations have been resolved.

DATED this 28th of July, 1988.

/s/ Richard G. Kopf
Richard G. Kopf*
United States Magistrate

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*I make two personal observations. First, I have not intended to, and do not express any personal opinion as to whether the Canyon should be demolished. Second, counsel for all parties are complimented for their assistance to me in resolving these difficult issues on an expedited basis. In particular, the candor, good humor, courtroom decorum, and legal analysis of Mr. Achelpohl are admired and appreciated by me.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT (PROUD), et al., Plaintiff, NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, Intervenor, vs. INTERSTATE COMMERCE COMMISSION, et al., Defendants.	CV88-0-247 MEMORANDUM AND ORDER ON PLAINTIFFS' AND INTERVENOR'S OBJECTIONS TO THE MAGISTRATE'S FINDINGS AND RECOMMENDATIONS FILED DEC 30 1988

On May 26, 1988, I assigned this case to Magistrate Richard G. Kopf as master, filing 108. He conducted a hearing on many of the issues in mid-July and issued his findings and recommendations to me on July 28, 1988, filing 261. The plaintiffs and intervenor objected to many of the findings of fact and conclusions of law. The defendants responded to those objections. Following oral arguments, I took this case under consideration.

Under Fed. R. Civ. P. 53(e)(2), when an action is tried to a master without a jury, "the court shall accept the master's findings of fact unless clearly erroneous." I have reviewed the transcript and the evidence from the magistrate's hearing. I shall proceed, page by page, through the magistrate's findings and recommendations and address

the parties' objections as they arise. My conclusions follow.

EXHIBIT 217G

One of the plaintiffs' and intervenor's most strenuous objections is to the magistrate's refusal to consider Exhibit 217G, the current grants manual of the National Parks Service. The magistrate sustained an objection to the offer and I agree with his determination that there is no evidence from which he could conclude that the parties to the contract intended to give the Federal Parks Service unilateral authority to amend the contract by revising the manual. Transcript at 780. The magistrate's determination is supported by Kenneth Compton's testimony, transcript 336:23-338:4, by Oliver Wolff's testimony, transcript at 541:19-25, and by Exhibit 2018.

The plaintiffs and intervenor also content that the grants manual should have been received into evidence to show an evolving standard of care to which the Park Service should be held, transcript at 398-99, or that it should have been received as "a statement by a party." Transcript at 990. The magistrate gave the parties sufficient opportunity to make arguments supporting their offer but he concluded that "they failed to set forth any logical reason" for the court to receive the evidence. I am inclined to agree with the magistrate. The manual is not law and there is no evidence to show that it reflects a legal standard of care for Park Service employees.

ICC INVOLVEMENT

The magistrate's analysis then turns to the issue of the Interstate Commerce Commission's involvement in the project. The magistrate relied on *Simmons v. I.C.C.*, 808 F.2d 22, 24 (7th Cir. 1986), which involved a pooling agreement wherein one railroad agreed to handle another railroad's cars over a 15-mile stretch of the first railroad's line and the other railroad agreed to stop using a portion of its line. The *Simmons* court held that the Commission did not require the railroad to submit an abandonment application in addition to a pooling agreement application where service to an area had not been affected.

The magistrate found that the evidence showed that 1) the portion of the "side hill lead" that was removed was known as an industrial track, 2) the trackage was located solely in Nebraska and 3) the shippers' service was not interrupted by the removal of the trackage. Relying on *Simmons*, the magistrate determined that the "[r]elocation of 'industrial' tracks, within one state, where shippers continue to receive service, does not require a license or permit or approval form the ICC." *See* magistrate's Findings and Recommendations ("MFAR") at 28.

I do not agree that *Simmons* helps to resolve the issues presented here because the railroads in *Simmons*, prior to the litigation, had sought and obtained the ICC's approval over their pooling agreement. *Simmons*, at 23. Though the *Simmons* court mentioned the exception of 49 U.S.C. § 10505 in the opinion, *id.*, the court did not invoke it to reach its holding. In any event, section 10505 apparently requires that the Commission determine whether a specific transaction is exempt under that provision upon

application of the railroad. No such determination has been made on these facts and the evidence presented at trial established that neither the Union Pacific nor Burlington Northern submitted an application for approval of the activities related to the tracks in question. Exhibit 2022.

In addition to his discussion of *Simmons*, the magistrate also noted that 49 U.S.C. § 10907(b)(1) does not require ICC approval for an abandonment of trackage such as the small section of Union Pacific's side hill lead. I agree with the magistrate's conclusion, albeit for different reasons. The objectors contend that 49 U.S.C. § 10903 controls the abandonment issue and that 49 U.S.C. § 11343(a)(6) controls the joint use agreement issue.[1] Given their objection, I shall explain how I arrive at the same result as the magistrate with regard to the abandonment issue.

Section 10907 provides, in part:

> (a) . . . [W]ithout the approval of the Interstate Commerce Commission, a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may enter into arrangement for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

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[1] Section 10903(a) states that a rail carrier may abandon its lines or discontinue use of any part of its lines only after the Commission finds that the present or future public convenience and necessity require or permit such action. Section 11343(a)(6) requires that any transaction involving joint use of a railroad line may be carried out only with the approval and authorization of the Commission.

> (b) The Commission does not have authority under section 10901-10906 of this title over (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located or intended to be located entirely in one State.

I shall begin my review of these issues by considering the magistrate's reliance of section 10907. As I analyze the possible exceptions to Commission's involvement under 49 U.S.C. § 10907, two issues surface: first, whether the Commission must approve or permit the abandonment of the one-half mile of the "side hill lead" trackage; and second, whether the Commission must approve or permit the agreement between the Union Pacific and the Burlington Northern for joint use of the Burlington's trackage. To answer either question, I first must determine whether the pertinent portions of trackage constitute "spur, industrial, team, switch or lead" trackage or regular line trackage.

Case Law

My research reveals that whether the track is "spur, industrial, team, switch or side" is a mixed question of fact and law, the answer to which turns on the uses, or intended uses, to which the track is put. *See Railway Labor Executive Ass'n v. City of Galveston*, 849 F.2d 145, 148 (5th Cir. 1988); *Illinois Commerce Comm'n v. United States*, 779 F.2d 1270, 1271 (7th Cir. 1985); *Nicholson v. I.C.C.*, 711 F.2d 364, 367 (D.C. Cir. 1983).

Two cases illustrate the direction of the court's analysis under section 10907. In *Nicholson v. I.C.C.*, 711 F.2d

364, 367 (D.C. Cir. 1983), the court drew upon a few relatively old cases to describe the difference between tracks exempt under section 10907 and regular railroad line. I quote extensively from that opinion:

> [I]t is sufficiently plain, from a consideration of not only the obvious purposes prompting the [Interstate Commerce Act] but also of the general nature of the tracks mentioned, that Congress intended to subject to the requirements of [section 1(18)] so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude from the operation of the statute all that mass of 'tracks' . . . naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923). . . . Shortly thereafter, the Supreme Court held that

> [i]f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes and extension of the railroad within the meaning of [section 1(18) of the Act], although the line be short and the character of the service contemplated be that commonly rendered . . . by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278, 46 S.Ct. 263, 266, 70 L.Ed.578 (1926).

Nicholson, 711 F.2d at 367-68. (emphasis omitted).

The Fifth Circuit has described the difference between regular line and the exempt trackage:

> If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad, or extension thereof" and there can be no abandonment of such trackage without obtaining a certificate of public convenience from the . . . Commission. If, however, the trackage is used in the loading, reloading, storage and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side.

New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966). The Seventh Circuit in *Illinois Commerce Comm'n v. United States*, 779 F.2d 1270, 1273 (7th Cir. 1985), referred to the *New Orleans* case and stated its belief that the case did not stand for the proposition that *every* track used in actual transportation haul from shipper to consignee was regular line. The Seventh Circuit noted that even the tracks that are used to load and unload goods are necessarily used in the actual transportation haul, but it is widely agreed that such tracks are exempt. Mindful of the guidance provided in these other circuits, and cognizant of the Commission's decision of *Sacramento Northern Railway Trackage Rights*, 290 ICC 145, I shall consider the uses to which the Union Pacific's and Burlington's tracks were put to determine if the magistrate's conclusion was accurate under the law.

Abandonment of Half-Mile

The plaintiffs and intervenor object to the weight given to the testimony of Dennis Duffy. Duffy, the Superintendent of Transportation Services for the Union Pacific in Nebraska, stated in response to questioning by the magistrate that the "side hill lead" was an "industrial" track. Duffy testified that the side hill lead provided "access to an industrial area via the railroad" and that trains had used the lead to run to the Gibson yard in north Omaha.

He stated that the lead ran along a portion of the main line and down from 19th or 20th street to 5th and Jones. The only segment of the track that was "abandoned" ran from approximately 10th to 5th streets. The portion of the lead that remains will continue to be used to service customers. He explained that the cars that traveled over the tracks were collectively referred to as "transfer jobs" and that the cars serviced customers as often as daily and as seldom as three times per week, making only one trip per day.

It is apparent from Duffy's testimony that the segment of the side hill lead that must be taken up in order for the development to progress is not a "line[ ] designed and used for continuous transportation services by through, full trains between different points of shipment or travel." Rather, the tracks were "necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for," through transportation by full trains. Based upon the description of the trackage and its usages, I conclude that it is "industrial". Given that the

abandoned trackage was industrial, and because the entire segment was within Omaha, Nebraska, I find that under section 10907(b)(1), the Union Pacific was not required to seek the ICC's permission to abandon it.

The objections to the weight given Duffy's testimony are not well-founded.

Joint Use Agreement Trackage

I am troubled by what I see as the magistrate's failure to consider whether the railroads should have obtained I.C.C. approval over their joint use agreement. I disagree with his use of *Simmons* to resolve this issue, because, as I pointed out previously in this memorandum, the railroads in *Simmons* obtained approval of their pooling agreement. I conclude that a separate finding as to whether the portion of trackage that is the object of the joint use agreement is exempt is warranted.

Little information was elicited at the trial about the nature of the trackage that is the object of the joint use agreement. The agreement itself states that:

> Burlington and Pacific each have separate lines of railroad that cross at grade in the so-called Lower Yard area near Fifth and Howard streets, Omaha, Nebraska; and . . .
> [A] land clearance program to provide space for development of ConAgra's headquarters facility will necessitate removal of Pacific's access track to the so-called Lower Yard area and Pacific desires to obtain an alternate access route by use of certain Burlington trackage.

Duffy testified that, under the joint use agreement, the Union Pacific will use the Burlington's track for their

transport jobs by catching the Burlington line directly across from the Missouri River bridge. The portion of jointly used tracks will take the transfer jobs to the Gibson yard and then go north to 5th and Jones where Union Pacific will catch its own trackage along the riverfront. Based on Duffy's testimony and the description of the use of the trackage in the agreement, I find that the tracks are "incidental to the receipt of shipments by the carrier or their delivery to the consignee" and, therefore, industrial. Accordingly, the joint use agreement falls within the exemptions of section 10907(a). The results that I reach here do not contradict the result reached by the magistrate.

CORPS OF ENGINEERS
LaRandeau's Testimony

The plaintiffs and intervenor apparently do not take exception to the magistrate's reliance on the testimony of John Morton, chief of the regulatory branch of the Omaha Division of the Corps, who stated that the developers were not required to obtain section 404 or section 10 permits from the Corps. There was objection, however, to the portion of the magistrate's report that analyzed the testimony of John LaRandeau. The magistrate accurately reported that "Mr. LaRandeau testified that his office . . . could require the city to submit any plans for realigning the sewers or other structures to his office for design approval *if* the City wanted the sewer or other structure to interface with the levee, but this authority was expressly limited to the levee right-of-way." MFAR at 30.

The plaintiffs' and intervenor's primary objection is that the limitation on the Corps' approval power that was

reflected in the magistrate's summary of LaRandeau's testimony is legally inaccurate. They argue that 33 C.F.R.208.10(a)(5) establishes that the Corps' approval authority is not limited solely to the levee right-of-way.

The regulation states:

> (5) No improvement shall be passed over, under, or through the walls, levees, improved channels or floodways, nor shall any excavation or construction be permitted within the limits of the project right-of-way, nor shall any change be made in any feature of the works without prior determination by the District Engineer of the Department of the Army or his authorized representative that such improvement, excavation, construction, or alteration will not adversely affect the functioning of the protective facilities.

Id. The plaintiffs and intervenor contend that the pressurized sewers and pumps are "features" of the flood control system or "works" and that the city may not alter them without first obtaining approval from the Corps' District Engineer that the alteration will not adversely affect the functioning of the levee, a "protective facility."

I observe prefatorily that the magistrate's reference to LaRandeau's "office" was to the Missouri River project office, not the office of the Corps of Engineers. The Missouri River project office is responsible for the supervision, operation and maintenance of the levee. LaRandeau testified that his office does not issue permits or licenses, but that his office had the right under certain circumstances to request information from sponsors about any "improvement, excavation, construction or alteration" that would affect the functioning of the protective facilities.

LaRandeau testified that "[t]he levee system itself is a protective facility," transcript at 957-58, and that his office's authority to make a "determination" extended to plans that would affect the pressurized sewers. Transcript at 963. He explained that when he receives information from a sponsor, the district engineer determines whether the modification will have an adverse impact on the floodwall. This determination is then sent to the sponsor. However, he admitted that the only enforcement authority possessed by his office is that of "gentle persuasion" which, he conceded, was the equivalent of no authority. Transcript at 985. This testimony diminishes the significance of provision 10.7 of the Operations and Maintenance Manual for the Omaha Flood Control Project which states that "[n]o surface drains, sanitary sewers or drainage facilities of any type shall be connected to the pressurized sewers without the approval of the District Engineer."

Though the Corps may have the right to demand to see the plans, this alone does not give the Corps control or responsibility over the project. Upon consideration, I find that the regulations require the Corps to make a determination that LaRandeau stated was ordinarily in the form of a letter. This determination is significantly different, I believe, from being directed to obtain approval. I conclude that the authority of LaRandeau's office, to the extent that it is required to make a determination, does not amount to approval power because it is, in fact, without the teeth of enforcement. Thus, I hold that the Corps is not involved in any meaningful way in the project and that the result reached by the magistrate was proper.

The objectors also note that whether the sewer realignment would increase the effluent discharge into the river is irrelevant and that the magistrate was wrong in concluding that the effect of the realignment is that only the "internal connects" would be changed, causing no material change to occur to the distribution system of the river. Given my immediately preceding finding, I conclude that these issues are not material to the discussion.

FEDERAL INVOLVEMENT UNDER THE NEPA AND NHPA

As was stated in the magistrate's report, compliance with the NEPA is required when there is a "major federal action that significantly affects the human environment" and compliance with the NHPA is required only when there is "a proposed Federal, or federally assisted undertaking." With this in mind, the magistrate observed that, even if a determination was made that the ICC was involved in some way in approving the railroads' activities, there was no evidence to demonstrate that its involvement would be to an extent that required NHPA or NEPA compliance covering the area of Jobber's Canyon. he stated:

> [E]ven if the ICC were or should be involved in some way, which at this point is gross speculation, on the record before me there is no evidence to conclude that, (a) such federal action would be a legal condition precedent to the implementation of the entire project, or, (b) that the ICC could exercise such factual control over the "federal portion" of the project that the ICC

> would be required to consider project-wide environmental or historic preservation issues, such as those relating to the Canyon.

MFAR at 28. The magistrate supported his conclusion with reasoning taken from *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987) and *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980). The magistrate discussed *Ringsred* early in his report, which included citations to *Winnebago* where appropriate.

Using similar reasoning, the magistrate also asserted that even if he had concluded that section 404 or section 10 permits were necessary from the Corps of Engineers, the amount of the Corps' involvement would be insufficient to trigger NEPA or NHPA review. Though my previous conclusions technically make this discussion unnecessary, I shall comment upon the "Major Federal Action" issue for purposes of an appeal.

According to the plaintiffs and intervenor, the magistrate's reliance on *Ringsred* and *Winnebago* is misplaced. They contend that the two Eighth Circuit cases improperly divorce the major federal action requirement from the inquiry into the significance of the impact on the human environment. The objectors indicate that the magistrate should have followed the Eighth Circuit's approach in *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974), and should have adopted the reasoning of *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425 (C.D. Cal. 1985). I am not convinced by the plaintiffs' and intervenor's argument that *MPIRG* and the subsequent Eighth Circuit cases are at odds. I shall explain.

Reconciling MPIRG

In *MPIRG*, college students filed suit to fight the sale of timber in the vicinity of the Boundary Water Canoe Area. The Eighth Circuit identified the threshold question as whether there was major federal action requiring NEPA compliance. The Forest Service contended that the project involved no major federal action and, having failed to meet the first portion of the NEPA test, that it had no obligation to issue an environmental impact statement ("EIS"). The court determined that it had the power to review the Forest Service's decision to refrain from issuing an EIS against a reasonableness standard.

The *MPIRG* court rejected the defendants' position that the NEPA required a bifurcated test. The court stated:

> To separate the consideration of the magnitude of federal action from its impact on the environment does little to foster the purposes of the Act. . . . By bifurcating the statutory language, it would be possible to speak of a "minor federal action significantly affecting the quality of the human environment" and to hold NEPA inapplicable to such an action.

Id. at 1321-22. The Eighth Circuit reasoned that if there was "a significant effect" on the environment made by the federal actions, then the intent of the NEPA was that the project undergo detailed analysis.

In analyzing the federal involvement, the court observed that the Forest Service approved locations for logging roads, camps and buildings, that it marked trees to be cut, and that it negotiated payments. Further, the

court found that the Forest Service granted extensions in six of eleven active timber sale contracts and that it had entered into agreements that modified seven others. It also noted that the Forest Service had been significantly involved in the sales of timberlands and the money that the Forest Service received from the sales was inadequate to insure reforestation.

The court also considered the severity of the impact on the environment in determining whether to require NEPA compliance. In so doing, the court noted that an indirect effect was the detriment to the "existence value" of the forest. Direct effects included the excess nutrient run off from logging, the erosion and water pollution caused by logging, and the impact that forest destruction would have on education, scientific experimentation and recreation. Based on all of these considerations, the court concluded that there was "Major Federal action significantly affecting the quality of the human environment" and that required an impact statement.

The plaintiffs and intervenor contend that Magistrate Kopf dissected the issue of federal involvement from the significance of the impact of that involvement in a way that was rejected by the *MPIRG* court as illogical. I disagree.

Ringsred and Winnebago

The federal government's involvement in the project at issue in *MPIRG* was obvious. Likewise, in both *Ringsred* and *Winnebago*, there was no question that the federal government was involved, albeit in a relatively minor way, in some portion of the project. However, in *Ringsred*

and *Winnebago*, the Eighth Circuit analyzed two main issues to reach the conclusion that the projects lacked sufficient federal involvement to require project-wide compliance with the NEPA. First, the court studied the federal agencies' statutory duties to determine whether federal action was a legal condition precedent to the commencement of the project. In both cases, the court found that federal action was not statutorily mandated and therefore was not a legal condition precedent to the projects.

The court next applied a three-part test to determine whether the factual veto power of the federal government agency constituted federal involvement in the project necessary to comply with the NEPA. The Eighth Circuit considered three factors: 1) the degree of discretion exercised by the agency over the federal portion of the project; 2) whether the federal government had given any direct financial aid to the project; and 3) whether the overall federal involvement with the project was sufficient to turn an essentially private action into federal action. After analyzing the facts particular to each case in conjunction with the three factors, the court concluded that the factual veto power did not constitute the necessary involvement in the projects. Thus, the court found that the agencies' actions did not require project-wide review under the NEPA. *See Winnebago* at 272-73; *Ringsred* at 1308.

Rather than relying upon *Ringsred* and *Winnebago*, the plaintiffs and intervenor urge the court to adopt the reasoning of the district court in California from *Colorado River, supra*. The *Colorado River* court criticized the *Winnebago* court insofar as the Eighth Circuit decided that

"major federal action" is an element that must be met to trigger NEPA and that "major federal action" has significance independent from the impact affecting the quality of the human environment. The court found that the *Winnebago* court's construction of the NEPA was incongruous with Congress' intent under the NEPA. *Colorado River,* 605 F. Supp. at 1430-31. The *Colorado River* court stated that "[i]f substantial questions are raised whether a project may have a significant effect on the human environment, an EIS *must* be prepared." *Id.* at 1430 *quoting Foundation for North American Wild Sheep v. United States,* 681 F.2d 1172, 1178 (9th Cir. 1982). The court also stated that "[t]he Federal Defendants are in error when they contend that because there was minimal federal involvement, there was no need to examine each and every effect, direct or indirect, 'on site' or 'off site'." *Id.* at 1433.

Inasmuch as I am urged to follow the reasoning of *Colorado River,* I note, once again, that this court is bound by the law in the Eighth Circuit. Thus, the magistrate's focus on Eighth Circuit case law was appropriate and necessary.

The plaintiffs and intervenor also urge the court to consider the regulations that are intended to guide in the interpretation of the statute. 40 C.F.R. §1508.18 states, in part:

> "Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly.

Id. I have considered this regulation and I have no trouble stating that the Eighth Circuit's approach to the NEPA is

in line with the regulations. The regulation defines "major federal action" as an action having two features: the action must produce effects that may be major and the action must be potentially subject to federal control and responsibility. I interpret the references to major federal action in *Ringsred* and *Winnebago* to include all necessary elements under the NEPA standard.

Based on these four cases and the regulation, I make the following observations. The main concern of *MPIRG* was that the test under the NEPA be considered as an integrated whole, according to which federal involvement *and* the significant effects on the environment must be considered. The *MPIRG* court's reasoning is in harmony with the regulation. The later Eighth Circuit cases, *Ringsred* and *Winnebago*, do not sever the NEPA's standard for compliance into two tests. Rather, the cases represent the court's attempt to define the extent to which the NEPA requires compliance in nonfederal portions of fundamentally nonfederal projects.

The *Ringsred* and *Winnebago* cases indicate that a court in the Eighth Circuit must consider under the NEPA whether the actions at issue are potentially subject to federal control and responsibility. To aid in the decision of this issue, the Eighth Circuit states that the court must consider the existence of a legal condition precedent and three other factors determinative of de facto control. Additionally, *Winnebago* established that the completion of the nonfederal aspects of a single project does not constitute a secondary or indirect effect of federal action. *Winnebago*, 621, F. Supp. at 273.

The Eighth Circuit has acknowledged that it would be an unreasonable burden to expand the scope of a federal agency's responsibilities under the NEPA to include projects over which the agency lacks sufficient control or responsibility. *Ringsred*, 828 F.2d at 1309. I believe that this is a wise qualification to impose upon agency power. Accordingly, I conclude that the magistrate's use of *Ringsred* and *Winnebago* was proper. Under the Eighth Circuit precedents, I find no problem with his alternative legal reasoning regarding whether the I.C.C.'s involvement and the Corps of Engineers' involvement would constitute potential federal control or responsibility that warrants NEPA compliance. This same analysis applies to the involvement of the federal government under the NHPA's "federal undertaking."

NHPA Analysis

The plaintiffs and intervenor take exception to the magistrate's use of the word "attempts" in his statement regarding the purpose of the NHPA.[2] I see no value in quibbling about his choice of the word "attempts." Clearly, the magistrate did not intend to diminish the importance or relevancy of the NHPA, as is demonstrated by his analysis of the federal involvement issue. The primary complaint of the plaintiffs and intervenor is that the magistrate did not apply the standards outlined in the

[2] The magistrate wrote, "Section 106 of the NHPA, 16 U.S.C. (470f, attempts to afford the Advisory Council the opportunity to comment on federal undertakings which might impact upon historical properties." MFAR at 8.

current grants manual that refer to historic properties and that the magistrate did not give sufficient reasons for rejecting the reasoning of the *Colorado River* court.

To the extent that the objections go to the magistrate's failure to consider the current grants manual, I refer the parties to the beginning pages of this memorandum. The plaintiffs and intervenor would also have me consider Exhibit 247 and the deposition testimony of Dr. King. The exhibit states that "[i]f NPS has sufficient jurisdiction to . . . object, identify, insist, and require, it surely has sufficient jurisdiction to justify compliance with Section 106." Exhibit 247, however, references Exhibit 241, the letter written by Compton, the tone of which was later diluted by Compton at trial. I find nothing to indicate that the magistrate's decision not to rely on 247 and the deposition testimony of Dr. King was clearly erroneous.

Further, I find that the magistrate's failure to consider the *Colorado River* decision was understandable based on the magistrate's analysis of the *Ringsred* decision. It seems apparent that he followed the reasoning of that court to resolve the NHPA issue: "since there was a lack of significant federal involvement for NEPA purposes, the project was not an "undertaking" for *NHPA* purposes." MFAR at 19. I cannot say that his conclusions regarding the NHPA are clearly erroneous, because the magistrate had already analyzed and concluded, as I do here, that there was insufficient federal involvement in the project to require compliance with the federal statutes.

PARK SERVICES ISSUES
Contract Documents

The plaintiffs and intervenor initially contend that the magistrate failed to consider the project proposal as part of the basic contract between the United States and the State. The magistrate acknowledged that page one of the basic contract stated that certain attachments were incorporated into the agreement by reference, including "1. General Provisions dated Dec. 1965 [and] 2. Project Proposal." The magistrate found that nothing clearly intended to constitute the "Project Proposal" was attached to the basic contract. The magistrate also identified the Project Scope (Description of Project), as three paragraphs on page one of Exhibit 217, and implicitly determined that it should serve as the basis for the "Project Proposal." MFAR at 36-37.

The objectors argue that the magistrate found that pages 8-10, 12-16, 22-28, 35-40, and 88-90 of Exhibit 217 were required as part of the project proposal and application. In fact, the magistrate stated that Kenneth Compton had testified that these documents were required as part of the application. This requirement does not transform the documents into the "Project Proposal." Moreover, they cite to neither testimony nor documentary evidence to demonstrate that the documents that they assert constitute the "Project Proposal" are the project proposal.

The magistrate expressly stated that he heard no testimony, other than that of Compton and Wolff, that explained which documents constituted the contract, and from their testimony he could not define the project proposal. His finding that the three paragraphs on page one of the basic contract sufficiently described the project

proposal shall not be disturbed unless clearly erroneous. Given the description, "Project Scope – Description of Project" that is written above the three paragraphs on page one of the contract, and after considering the testimony of Compton and Wolff, I find no basis for overturning the magistrate's finding in regard to the contents of the contract.

Acquisition or Development

The objectors also contend that the magistrate was wrong in finding that federal funding assisted only in "the acquisition of 4.2 acres of land east of the Central Park Mall near the Missouri River." MFAR at 37. The plaintiffs and intervenor concede that the federal funding was used only for stage one, but they contend that the expenditures made pursuant to stage one included expenditures for the planning and development of the open public use area, if not the park. Assuming that there was development, then they argue that the general conditions of the contract required approval of the development plans. The plaintiffs and intervenor have referred me to the testimony of Wolff.

After reviewing Exhibit 231, the final audit, Wolff stated that some of the listed payments to HDR were made for development activities and other were not. He also stated that federal money was used to pay for some construction and engineering plans. Wolff stated that site clearing and grading were development functions and it is apparent from the audit that Anderson Excavating and Wrecking, and Negus Sweenie, Inc. perform those services. Counsel for the plaintiffs asked whether, prior to

the sixth amendment to the contract in 1986, *see* Exhibit 217F, the project was an acquisition and development project. Wolff answered that it was. Further evidence offered in support of the objectors' argument is that the Federal Assistance Forms submitted to the Park Service with the original application and all amendments thereto, referred to "Acquisition, Development and Planning." Based on this evidence, the objectors contend that the magistrate's finding that the development was "unassisted" and "nonfederal" are clearly erroneous, and that the conclusion that the project was closed out as an acquisition project is unfounded.

In addition to relying upon the description in the first paragraph of the Project Description portion of the contract, the magistrate noted that "[t]he final amendment to the project, (Exhibit 217F), made it clear that development was not part of the project: 'When acquisition was complete, there weren't funds available to do the stage II development items." MFAR at 53. I note, too, that when asked about the state of the dedicated land upon completion of stage one, Wolff stated:

> A: [The land] "was clearly identified as a public use area.
>
> Q: But it hadn't been developed as a park?
>
> A: Right.

Additionally, Exhibit 218K says that the application for the original $300,000 was for the land acquisition only.

Based on the description in the contract and on Exhibit 217F the magistrate determined that the project was properly closed out as an acquisition project and, concluded, therefore, that the "general conditions" regarding

development and approval of development plans were a nullity. Accordingly, there was no need to obtain approval of plans when the park was developed, and thus, no need to get a section 106 review.

This issue appears to me to be much closer than the magistrate's report reflects. Considering Wolff's testimony, it may well be that certain development activities were undertaken by HDR and others prior to 1986 and that none of the plans for the development activities were approved. The problem that I see with the objectors' argument is that they failed to establish which payments were made to HDR, Negus and Anderson for which activities.

The final audit, Exhibit 231, reflects that between 1978 and 1984 approximately $312,919.63 was paid over several years to HDR, approximately $31,857 was paid to Negus and that approximately $44,110 was paid to Anderson, totalling approximately $388,886.63. This amount is greater than the state portion of the project cost by roughly $13,886.63. Based on Wolff's testimony and a strict interpretation of the Term "development", it may well be that development activities were undertaken pursuant to stage one without the appropriate approval. However, given the inability of Wolff to state how much of the payments were made for development and what was spent strictly on acquisitions, I cannot conclude that the magistrate's conclusion is clearly erroneous.

Conversion of Use – Basis of Original Funding

The plaintiffs and intervenor contend that the parties to the redevelopment agreement have permitted a

conversion of the use of the park land without first obtaining the approval of the director of the Parks Service. The conversion, they argue, is apparent because the 1983 plans were different in material respects from the plans in the application for the original funding. They rely on Exhibit 304 and upon Dr. Buchanan's testimony to demonstrate the inconsistencies between the 1983 plans and the basis for original funding.

While it is true that Exhibit 304 indicates that several portions of the project were completely revised under the 1983 plan, the extent and nature of the revisions are not plain from the exhibit. Revisions do not automatically correlate into inconsistencies. Thus, I find no reason to conclude that these revisions are inconsistent with the basis for the original funding.

Additionally, the plaintiffs and intervenor criticize the magistrate's reliance on Buchanan's characterization of the project as a "continuum" and argue that the magistrate should have put more weight on other portions of Buchanan's testimony. They assert that King's testimony and Exhibit 241, the letter written by Compton enumerating his concerns about the project, should have been given more weight, and that Compton's testimony at trial should have been given less weight. I observe that the magistrate heard the trial without the aid of a jury and, therefore, he was obliged to make determinations as to the witnesses' credibility and the weight that should be accorded to the evidence.

One particular change about which the plaintiffs and intervenor object is that in the original application the park was to be used for active and passive recreation and

now the plan is for the park to accommodate only passive recreation. The objectors contend this difference constitutes a conversion of the use of the land that requires the approval of the NPS director. *See* 16 U.S.C. §460*l*-8. The plaintiffs and intervenor point to 36 C.F.R. 59.3(d) and the current grants manual to establish the distinction between active and passive recreational uses. The regulation states, in part:

> A change from a swimming pool with substantial recreational development to a less intense area of limited development such as a passive park, or vice versa, would . . . require NSP review and approval.

This provision, however, does not help me to define passive and active recreational uses. The plaintiffs and intervenor have not demonstrated that the magistrate's reliance on Martin Shukert's testimony about passive and active uses was clearly erroneous. Therefore, I shall not disturb the magistrate's finding that the "passive" limitation does not contravene the original basis for the funding and is not a conversion.

Conversion of Use – Lack of 6(f)(3) Boundaries

The plaintiffs and intervenor also contend that the failure of the developers to establish section 6(f)(3) boundaries amounts to a conversion because, without the boundaries, there is no way to determine whether a conversion has occurred. They object to the magistrate's report, which, according to them, concludes that section 6(f)(3) boundaries are not necessary. The magistrate made no such finding.

Rather, the magistrate determined that it was unnecessary for the parties to have a map or plat that illustrates that 6(f)(3) boundaries. He decided, based on the testimony, that the 6(f)(3) boundaries were set by the description of the land in the acquisition project contract, and the magistrate stated that "inasmuch as Compton was satisfied" with the boundaries, he was, too. The evidence supports his conclusion.

Alternatively, the plaintiffs and intervenor contend that the magistrate is precluded from finding that the 6(f)(3) boundaries were set, because there continues to be disagreement regarding the boundaries. They ask the court to consider Exhibits 235 and 244-244A relative to each other. These exhibits show that two different parties, at one time, disagreed on the placement of the boundaries. Compton, however, stated that until the State of Nebraska responds to his office and asserts that it believes that the boundary is different from the boundaries set by the description of the land acquired, then he is satisfied that the boundaries are established. Again, I have no basis for finding that the magistrate's findings are clearly erroneous.

Conversion of Use – Financing

An additional objection concerning the conversion issue requires that I analyze the method chosen by the county to finance the development project. The focus of the objections to the financing scheme is that the parties to the redevelopment agreement have failed to insure that the county will maintain sufficient control over the

project. The plaintiffs and intervenor rely upon a Solicitor's opinion that if it is possible for a state or political subdivision to forfeit its proprietorship of the LWCFA property, such would constitute a lack of control over the land and be considered a conversion under the Act. Based on that opinion, the plaintiffs and intervenors argue that under the documents comprising the basis of the project's financing, the county has exposed itself to the possibility of losing proprietorship and possession of the land and, accordingly, there has been a conversion under the LWCFA.

The magistrate determined that the Solicitor's opinion did not apply and provided five reasons for his conclusion. First, he found that the county was not a party to the trust indenture and that it did not pledge anything pursuant to the trust indenture. He recognized that the documents had to be read in conjunction with each other, but he concluded that only the ORDC pledged anything, and that was the revenue and income derived from the project. The real estate was not pledged. I agree with the magistrate's findings.

The plaintiffs and intervenor object to the extent that the indenture requires, in the event of a default, that the ORDC relinquish possession of the park land. However, I note that "possession" and "proprietorship," as was used in the Solicitor's opinion, have two different meanings. Moreover, I note that the Bank and the ORDC's are bound, by the terms of the trust indenture, to abide by the requirements of the redevelopment agreement. One part of the redevelopment agreement establishes that the county will have the sole control over design of the park.

The magistrate's second reason for finding that the Solicitor's opinion did not apply to the facts presented here was that even if the ORDC defaulted under the trust indenture, state law and a city ordinance are in place to ensure that the park would be operated for the use of the public as a park. His second reason ties into the magistrate's third reason: that the state statute and city ordinance constitute clear-cut provisions for the maintenance of county control over the park.

The plaintiffs and intervenor object to the magistrate's determination that Neb. Rev. Stat. 23-820 applies to the case. The Nebraska statute authorizes the county to "join with any other political or governmental subdivision, or with any agency, or public corporation" in the acquiring, holding improving and operating of any park. The plaintiffs and intervenors correctly point out that the ODF and ORDC are private corporations and therefore, the statute does not authorize the contract between the county and the private corporation. I agree that the statute is inapplicable. However, I find no reason to conclude that the statute's inapplicability completely undermines the magistrate's analysis.

I recognize that the plaintiffs and intervenor also objected to the magistrate's reliance on the city ordinance dedicating the land to use as a public park. They argue that the magistrate's reliance on the dedication is premature, since the dedication is valid only to the extent that the county had good title to the land when it was dedicated for park use. Considering that the magistrate accepted the ordinance into evidence and considering that the parties agreed to try the title issue separately, I am

not convinced by the plaintiffs' and intervenor's argument. I note that Neb. Rev. Stat. §23-3114 provides that the county board may enter into other contracts for authorized purposes. Additionally, Exhibit 207 states that the county will use the Project as a public park, and Exhibit 209, the ground lease, states that the corporation and county shall use the land only as a public park. For these reasons, I find no reason to decide that the magistrate's reliance on the ordinance and other documents was clearly erroneous.

Moreover, I find nothing clearly erroneous about the magistrate's conclusion that the argument regarding conversion based on the project's financing is speculative. There has been no default by the ORDC under the trust indenture yet. Until there is, there is no credible possibility of conversion. Given that the magistrate's findings regarding the financing scheme are not clearly erroneous, I shall overrule the plaintiffs and intervenors' objections.

Conversion of Use – Redevelopment Covenants and Park Covenants

The plaintiff and intervenor's final objection is to the magistrate's conclusion that the park covenants and the architectural review committee's control over the county does not constitute a conversion under the LWCFA. He reasoned that although the county is not a signatory to the redevelopment covenants, the redevelopment agreement states that the county is solely responsible for the park. The magistrate also found that, although the park covenant, which were signed by the county, require that the park design be consistent with the redevelopment

area, this covenant does not place the county at the mercy of the parties to the redevelopment agreement. He found that the PIP is the blueprint for the current plans and is the 1983 HDR plan. Given the testimony at trial that the current plans are a continuum of the 1983 plans, and that nothing significant has been altered, I cannot say that the magistrate's finding that the architectural review committee does not control the county's park design is clearly erroneous.

IT IS ORDERED that for all the reasons provided in this memorandum, the Plaintiffs' and Intervenor's Objections to the Magistrate's Findings and Recommendations, filing 268, are rejected and the Plaintiffs' and Intervenor's Motion to Reject the Magistrate's Findings and Recommendations, filing 269, is denied. I shall withhold judgment in the matter until all the issues are concluded.

Dated December 30, 1988.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PEOPLE FOR RESPONSIBLE OMAHA URBAN DEVELOPMENT, et al.,	)	CV88-0-247
Plaintiffs,	)	JUDGMENT
NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES,	)	(Filed FEB 14 1989)
Intervenor,	)	
vs.	)	
INTERSTATE COMMERCE COMMISSION et al.,	)	
Defendants.	)	

For the reasons provided in the accompanying memorandum and my previous memorandum, filing 443,

IT IS ORDERED that:

1. the findings and recommendations of the magistrate, filings 261 and 449, are approved determining that:

   a. based upon the existing Riverfront Redevelopment Agreement (including all approved plans, specifications, and construction drawings as of July 11, 1988), there is no federal funding, federal licensing or other federal involvement requiring a section 106 review under the NHPA or otherwise implicating the NEPA or the LWCFA;

   b. insofar as the Omaha Development Foundation and ConAgra are concerned, a section 106 review (or other action required under the NHPA, the

NEPA or the LWCFA) could not result in a federally required retention of one or more buildings in Jobbers Canyon;

c. the National Trust for Historic Preservation in the United States has standing for itself and its members to bring this action;

d. People for Responsible Omaha Urban Development lacks standing for itself, but PROUD has standing for its members;

e. Roger Durand has standing;

f. Mercer Management Company has standing for itself;

h. the court has before it appropriate parties such that adequate relief can be provided by the court;

2. the National Trust for Historic Preservation in the United States has capacity to sue the federal defendants and the nonfederal defendants;

3. all dispositive motions at any time made by any party and all motions for injunctive relief are denied;

4. plaintiffs' and intervenor's motion for leave to supplement the record, filing 443, are denied; and

5. final judgment is entered in favor of the defendants and against the plaintiffs and intervenor.

Dated February 14,1989.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

United States Court of Appeals
For The Eighth Circuit

No. 89-1342NE	*	
People for Responsible Omaha Urban Development, et al,	*	
Appellants,	*	
National Trust for Historic Preservation,	*	Appeal from the United States District Court for the District of Nebraska
Intervenor Below,	*	
Appellant,	*	
vs.	*	
Interstate Commerce Commission; et al,	*	
Appellees.	*	

The injunction prohibiting demolition pending appeal is denied as to the Carpenter Paper Company Building and the Nogg Paper Company Building. Damages may be incurred by appellees with regard to contracts involving these two structures and appellants have indicated an inability to post security for such damages. An injunction prohibiting demolition of the John Day Company Structures (3), the Wright & Wilhelmy Building and the New Idea Building, pending an expedited appeal, is granted. The Clerk of this Court is directed to set this case for argument during the April court session and establish an expedited briefing schedule for the submission of this appeal.

Appellant's Brief	March 15, 1989
Appellee's Brief	March 29, 1989

Appellant's Reply Brief April 7, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1342

People for Responsible Omaha Urban Development; Mercer Management Company; Roger Durand,

Appellants,

National Trust of Historic Preservation, Intervenor Below

Appellant,

v.

Interstate Commerce Commission; Heather J. Gradison; National Park Service; Donald P. Hodel; Army Corps of Engineers; John O. Marsh, Jr.; Federal Aviation Agency; James H. Burney, IV; City of Omaha, Mayor Bernie Simon; County of Douglas, Chairman Michael Albert; Omaha Development Foundation; Conagra, Inc.,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Filed: June 9, 1989

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

ORDER

The injunction entered by this Court pending an expedited appeal of this case is dissolved.

An opinion will be issued later.

A true copy.

Attest: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1342

People for Responsible Omaha Urban Development; Mercer Management Company; Roger Durand,

Appellants,

National Trust of Historic Preservation, Intervenor Below

Appellant,

v.

Interstate Commerce Commission; Heather J. Gradison; National Park Service; Donald P. Hodel; Army Corps of Engineers; John O. Marsh, Jr.; Federal Aviation Agency; James H. Burney, IV; City of Omaha, Mayor Bernie Simon; County of Douglas, Chairman Michael Albert; Omaha Development Foundation; Conagra, Inc.,

Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: April 12, 1989
Filed: September 14, 1989

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

Plaintiff People for Responsible Omaha Urban Development (PROUD) moved in the District Court for a temporary restraining order to prevent the non-federal defendants from completing preparations for construction of the Riverfront Redevelopment project in downtown Omaha. Although no federal funds, licenses, or permits were involved in the project, PROUD named three different federal agencies – the Army Corps of Engineers, the National Park Service, and the Interstate Commerce Commission – as defendants and based its claims on their alleged failure to comply with federal environmental statutes.

In April 1988, the District Court[1] denied a temporary restraining order and a preliminary injunction. In February 1989, the District Court entered its final judgment on the merits in favor of defendants. This appeal followed. Our Court granted a partial stay pending appeal. In June 1989, we dissolved the stay, and appellants' petition for a rehearing en banc of that order was denied.

Appellants' goal in bringing this lawsuit was to enjoin demolition and construction activities in an historic warehouse district known as Jobbers Canyon. At the time

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[1] The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

this appeal was briefed and argued, of the original twenty-two buildings in Jobbers Canyon only five had not already been demolished. Although the non-federal appellees argue that the case therefore is moot, we do not address that question. Instead, we rest our decision on the same grounds that provided the basis for the decision of the District Court.

Appellants do not allege that any of the named federal agencies has licensed or funded any part of the Jobbers Canyon project. Instead, they argue they each gave or should have given approval to actions related to the project. The required approvals that appellants refer to, however, all relate to the development of Central Park East, which is a separate, county-sponsored project.

To show a basis for relief, PROUD had the burden of establishing that one or more federal agencies had sufficient control over the Jobbers Canyon project to bring the consultation and environmental review provisions of the National Historic Preservation Act and the National Environment Policy Act into play. *See Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980). The District Court found that no such federal control over the project exists. Specifically, the District Court found that (1) there is no federally assisted undertaking or major federal action in connection with the Jobbers Canyon project; (2) there is no federally assisted undertaking or major federal action which in any way affects Jobbers Canyon; and (3) there is no federally assisted undertaking or major federal action that, if enjoined, could prevent the non-federal defendants from demolishing Jobbers Canyon.

For reversal, appellants essentially restate the arguments that were rejected by the District Court in its thorough memorandum opinions as well as by the magistrate is his detailed analysis of the case. Having carefully considered these arguments, the opinions below, and the record in this case, we conclude that none of the District Court's findings of fact is clearly erroneous and that the court did not commit any error of law. None of appellants' arguments persuades us that any of the federal defendants has had that degree of *de jure* or *de facto* control over the Jobbers Canyon project necessary to trigger consultation procedures and environmental review under any of the federal statutes upon which appellants rely. Accordingly, the judgment of the District Court is affirmed. *See* 8th Cir. R. 14.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 89-1342

People for Responsible Omaha Urban Development; Mercer Management Company; Roger Durand, Appellants, National Trust of Historic Preservation, Intervenor Below Appellant, v. Interstate Commerce Commission; Heather J. Gradison; National Park Service; Donald P. Hodel; Army Corps of Engineers; John O. Marsh, Jr.; Federal Aviation Agency; James H. Burney, IV; City of Omaha, Mayor Bernie Simon; County of Douglas, Chairman Michael Albert; Omaha Development Foundation; Conagra, Inc., Appellees.	Appeal from the United States District Court for the District of Nebraska. CV-88-C-247

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

September 14, 1989

Appellees will recover from appellants the sum of $783.00.

A true copy.

Attest: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED 10/30/89

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1342-NE

People for Responsible Omaha Urban Development, et al.,	*	
Appellants,	*	Order Denying
vs.	*	Petition for
Interstate Commerce Commission, et al.,	*	Rehearing and Suggestion for Rehearing
Appellees	*	En Banc

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 20, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit.